Supreme Court, U.S.
FILED

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No. ____

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In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

FRANK J. SPISAK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eighth Amendment, as construed by the Court in *Mills v. Maryland*, 486 U.S. 367 (1988), prohibit instructions to the jury that its capital sentencing verdict must be unanimous, unless the jurors are also instructed that in weighing the aggravating circumstances against mitigating factors they do not need to unanimously agree on the existence of any particular mitigating factor?

2. In finding that trial counsel's closing argument constituted an ineffective assistance of counsel, did the Sixth Circuit improperly ignore the trial counsel's strategy and give too little deference to the state courts?

LIST OF PARTIES

The Petitioner is Marc C. Houk, the Warden of the Ohio State Penitentiary. (Betty Mitchell, Respondent-Appellee below, was the former warden at the Mansfield Correctional Institution, where Ohio's death-sentenced prisoners had previously been held.)

The Respondent is Frank Spisak, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Marc C. Houk, the Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Spisak v. Mitchell*, 465 F.3d 684 (6th Cir. 2006), is reproduced at App. 1a–63a. The Sixth Circuit's order denying the State's petition for rehearing and suggestion for rehearing en banc is reproduced at App. 64a. The Memorandum of Opinion and Order of the United States District Court for the Northern District of Ohio is reproduced at App. 65a–241a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its order denying the State's rehearing petition on February 15, 2007. The State timely filed this petition and invokes the Court's jurisdiction under 28 U.S.C. 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

* * *

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

* * *

INTRODUCTION

Respondent Frank G. Spisak engaged in a shooting spree on the Cleveland State University campus spanning several months in which he killed three persons, seriously wounded a fourth, and threatened a fifth. App. 5a-6a. Spisak openly admitted to the shootings in his statements to the police and at trial, expressing no remorse and describing in detail his allegiance to the teachings of Adolf Hitler and to "declaring war on the society that exists today." See, e.g., App. 31a-33a, 300a-302a, 304a-318a. An Ohio jury found Spisak guilty of aggravated murder and sentenced him to death. The Ohio courts affirmed on appeal, and the federal district court denied his habeas corpus petition. The Sixth Circuit reversed, vacating Spisak's sentence based on his arguments of constitutional error in the sentencing-phase jury instructions and ineffective assistance of counsel at sentencing.

The Sixth Circuit's grant of habeas relief on each issue calls for the Court's review and reversal. First, the Sixth Circuit's expansive and erroneous application of *Mills v. Maryland*, 486 U.S. 367 (1988), in habeas review has created inconsistency among the federal circuit courts and

violated the strictures of AEDPA. Specifically, the Sixth Circuit has incorrectly concluded that *Mills* prohibits instructing a jury that they must reach unanimous agreement on the *ultimate question* of whether aggravating factors outweigh mitigating factors, even though *Mills* addresses only a procedural anomaly that improperly required unanimous agreement on the existence of particular mitigating factors. The Sixth Circuit has also incorrectly read *Mills* to prohibit an instruction that arguably suggests a jury must unanimously reject the death penalty before considering non-capital sentences; this prohibition on so-called "acquittal-first" instructions reflects a fundamental misunderstanding of the *Mills* requirement that a juror be "permitted to consider all mitigating evidence." See *Mills*, 486 U.S. at 384. In applying these newly-created rules, the Sixth Circuit failed to comply with the highly deferential AEDPA review standards, and has mandated jury-instruction requirements that are not recognized by any other circuit court and that are at odds with other Sixth Circuit panel decisions.

Second, the Sixth Circuit improperly granted habeas relief on the petitioner's ineffective assistance claim. At sentencing, counsel for the petitioner candidly confronted facts about his client that had never been in dispute: that he was a professed follower of Adolf Hitler and had killed three people in a hate-inspired shooting spree. Rather than attempting to convince the jury of his client's fundamental goodness, counsel emphasized his client's psychiatric problems. The Sixth Circuit's conclusion—not only that trial counsel's performance was deficient, but that any disagreement with that conclusion would be objectively unreasonable—"g[ave] too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough v. Gentry*, 540 U.S. 1, 11 (2004). The State therefore asks that the Court grant review and reverse the Sixth Circuit's grant of the writ.

STATEMENT OF THE CASE

A. Spisak killed three people and seriously injured a fourth during a hate-inspired campus shooting spree.

The Respondent, Frank G. Spisak, is under a sentence of death for the aggravated murders of Horace T. Rickerson, Timothy Sheehan, and Brian Warford. The prosecution's evidence at trial disclosed that Spisak killed Rickerson, Sheehan, and Warford in a series of shootings at Cleveland State University in Cleveland, Ohio, in early 1982. During the spree Spisak also shot John Hardaway seven times, while Hardaway waited for a commuter train at a city station. Hardaway miraculously survived his wounds and was later able to identify Spisak as the shooter. App. 5a–6a.

The jury was also presented with compelling evidence that the shootings were motivated by Spisak's hatred of black men and Jews and that Spisak would have continued to kill if he had not been caught. The prosecution introduced into evidence a book about Adolph Hitler taken from Spisak that was hollowed out to conceal a gun; a tee shirt worn by Spisak that had on it the words "white power;" and a Nazi flag. Trial Tr. 772–774. A detective testified for the prosecution that in a post-arrest interview, Spisak described an incident in which he returned to Cleveland State and was about to shoot a black man he encountered in an elevator but decided not to shoot when a white man got on the elevator just as he was drawing his gun. Spisak also stated that he planned to go to a downtown bar with a machine gun and just "open up" on every black person that was in there; that he was then "going to start on all the Jewish lawyers;" and that he wanted to kill all the Jewish lawyers, "one by one." App. 301a. In his testimony at trial, Spisak admitted that he was an admirer of Adolph Hitler, and that he was a member of a splinter group of the American Nazi Party at the time he killed Rickerson. App. 311a, 313a.

B. A state court jury convicted Spisak and recommended a sentence of death, which the trial judge accepted.

The defense did not contest that Spisak shot the victims, but instead unsuccessfully sought to establish that Spisak was legally insane. The defense attempted to explain Spisak's Nazi beliefs as a symptom of mental illness, eliciting lengthy testimony from Spisak regarding the nature of his beliefs. See, e.g., App. 303a–318a. The defense then offered the testimony of Dr. Oscar Markey, who gave contradictory testimony concerning whether Spisak suffered from a mental illness at the time of the crimes.

The trial court ultimately disallowed Spisak's insanity defense, granting the prosecution's motion to strike Dr. Markey's testimony as irrelevant and prejudicial to the defense, App 18a, and refusing to instruct the jury on insanity, App. 27a. The jury returned a guilty verdict on, among other things, four counts of aggravated murder with nineteen death specifications.

During sentencing, Spisak's counsel presented additional expert testimony that Spisak was mentally ill. Dr. Sandra McPherson, a clinical psychologist, opined that Spisak suffered from Schizotypal and Borderline Personality Disorders characterized by bizarre and paranoid thinking, gender identification conflict and emotional instability. Trial Tr. 2429–40. According to Dr. McPherson, Spisak's defects substantially impaired his ability to conform to the law. Trial Tr. 2429. Dr. Kurt Bertschinger, a psychiatrist, testified that although Spisak did not meet Ohio's criteria for legal insanity, Spisak nevertheless suffered from a mental illness that would substantially impair his ability to conform his conduct to the requirements of the law. Trial Tr. 2554. Finally, Dr. Markey again testified, stating that he essentially agreed with Dr. Bertschinger's diagnosis. Trial Tr. 2704–06 .

In closing argument, Spisak's counsel began by acknowledging the number and brutality of the proven aggravating circumstances, and expressing sympathy for the victims' families. App. 271a–273a. Counsel then argued that although Spisak did not lead a "good life" and had no "good deeds" to his credit, Spisak's mental illness was a mitigating factor that the jury should consider. App. 275a–277a. Counsel reminded the jury that under Ohio law, the jury was required to consider as a factor in mitigation a mental illness that substantially impairs a defendant's ability to conform his conduct to the law. Counsel then argued extensively that although the defense's expert testimony was insufficient to meet the test for legal insanity, it was more than sufficient for the jury to conclude that Spisak was substantially impaired by mental illness and that this mitigating factor outweighed the admittedly strong aggravating circumstances. App. 277a–289a. Finally, counsel responded to arguments he expected the prosecution to make, App. 289–290a, and concluded by assuring the jurors that he was proud of them for doing their duty, App. 293a–294a.

In its sentencing instructions to the jury, the court explained that the State had "the burden of proving beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the [sentence] of death." The court further instructed that "to outweigh means to weigh more than, to be more important than," and that "[t]he existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors." App. 257a.

The court explained that the aggravating factors were those death specifications that the jury had already returned guilty verdicts on during the guilt phase. The court read through each of these specifications for the jury. App. 258a–261a.

The trial court then stated that "[m]itigating factors are those which, while not excusing or justifying the offense, or offenses, may in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment." The court specifically listed as a mitigating factor that "at the time of committing the offense the defendant because of mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." The court also instructed the jury that it could consider "the history, character and background of the offender" as a mitigating factor, as well as "any other factors that are relevant to the issue of whether the defendant should be sentenced to death." The court did not instruct the jury that it needed to reach a unanimous conclusion as to the presence or absence of the mitigating factors. App. 261a.

The court then summarized the Ohio statute setting forth the proper jury sentencing procedure as follows:

> [Y]ou, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel. From this you must determine whether, beyond a reasonable doubt, the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case.
>
> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, then you must return that finding to the Court.
>
> I instruct you, as a matter of law, that if you make such a finding, then you must

> recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr.
>
> A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

App. 263a. The court described the two possible life sentences from which the jury would choose in such a circumstance. *Id.*

The court then described in detail the verdict forms that the jury would be required to complete. The first stated,

> We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the sentence of death be imposed . . . .

The court noted that "there [wa]s a spot for twelve signatures" at the bottom of the form, and that "[a]ll twelve of [the jurors would] sign it if that [wa]s [their] verdict."

The second form, similarly, stated,

> We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving [the life sentence selected by the jury].

The court noted that "again, all twelve of [the jurors] must sign whatever verdict it is you arrive at." App. 264.

The jury recommended a sentence of death, which the trial court accepted. App. 3a.

C. The Ohio Supreme Court adjudicated on the merits Spisak's claims regarding the jury's sentencing instructions and ineffective assistance of counsel at sentencing, and rejected both claims.

The Ohio Court of Appeals vacated one of the four aggravated murder convictions and the accompanying specifications, and affirmed the remainder of Spisak's convictions. App. 67a. Spisak obtained new counsel and, under Ohio procedure, moved for a second round of review before the Ohio Court of Appeals, which the Supreme Court of Ohio granted. The Ohio Court of Appeals again affirmed his convictions. The Supreme Court of Ohio denied Spisak's motion for a *third* round of appellate court review. App. 68a.

In his appeal to the Supreme Court of Ohio, Spisak claimed, among his sixty-four assignments of error, that

"[j]ury instructions requiring unanimity for a life verdict at the penalty phase deny the accused his right to a fair trial and freedom from cruel and unusual punishment" under the U.S. and Ohio constitutions, and that he was denied his constitutional right to effective assistance of counsel during the mitigation phase of his trial. App. 80a–81a. The Supreme Court of Ohio reviewed and rejected all of Spisak's claims on the merits. App. 246a. As to Spisak's jury-instruction claim (claim fifty-four), the court found that it had already rejected the same argument in several of its prior cases. App. 246a. As to Spisak's ineffective assistance claim (claim fifty-seven), the court found it not well-taken in light of numerous authorities, including *Strickland v. Washington*, 466 U.S. 668 (1984). App. 247a.

Spisak's convictions became final when this Court denied certiorari review of the Ohio Supreme Court's decision on March 6, 1989. See 489 U.S. 1071.

D. The federal district court denied Spisak's petition for habeas corpus relief.

After unsuccessfully seeking state post-conviction relief, App. 83a, and to reopen his direct appeal, App. 95a, Spisak filed a petition for habeas corpus. The district court denied Spisak relief on all of his thirty-three grounds, including a challenge to the sentencing-phase jury instructions and to his counsel's performance during sentencing. App. 65a–241a.

As to Spisak's challenge to the sentencing-phase jury instructions, the district court found that the argument was precluded by *Jones v. United States*, 527 U.S. 373 (1999). Spisak argued that the trial court erred by instructing the jury its sentence must be unanimous but failing to explain the consequences of the jury's inability to reach unanimity. App. 141a–144a. But in *Jones*, the Court established that a trial court's failure to instruct on the consequence of jury

deadlock does not give rise to a cognizable constitutional claim. 527 U.S. at 381-82.

The district court further noted the possible applicability of the Sixth Circuit's decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), which had applied *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), in habeas to vacate a petitioner's sentence. In *Davis*, the Sixth Circuit had held that an instruction requiring a capital jury to "first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." 318 F.3d at 689. Observing that *Davis* apparently was in conflict with other Sixth Circuit decisions holding that similar instructions did not violate the Eighth Amendment, the district court declined to address whether Spisak's sentence was unconstitutional in light of *Davis*, in view of Spisak's failure to allege specifically that the instructions in his case precluded the jury from considering mitigating evidence. App. 145a–146a.

Rejecting Spisak's claim that counsel's closing arguments at sentencing were constitutionally ineffective, the district court found that counsel's alleged errors "can easily be attributed to a trial strategy." App. 154a. The district court found specifically that counsel's vivid portrayal of the murders and his own expressed sympathy for the victim's families were likely part of a strategy to ingratiate himself with the jury and to blunt the prosecutor's depiction of the murders in his forthcoming closing argument; that counsel's negative references to Spisak were also clearly part of the defense's strategy in mitigation, that is to show that Spisak's mental defect was a mitigating factor; and that counsel argued "at great length about the testimony from each of the defense's three psychological experts and how such testimony demonstrated that Spisak's mental defect substantially reduced his ability to conform his conduct to the

requirements of the law." App. 155a–156a. Finally, the district court concluded that "[e]ven assuming counsel's performance was deficient, Spisak cannot claim that he was prejudiced by counsel's behavior," because there is no reasonable probability that the jury would have reached a different sentence if counsel had portrayed Spisak with more sympathy, given the "heinous nature of the murders, Spisak's self-admitted lack of remorse, and the totality of the evidence." App. 158–159.

E. The Sixth Circuit reversed the district court and vacated Spisak's sentence

The Sixth Circuit reversed the district court and granted habeas corpus relief, vacating Spisak's sentence.

The Sixth Circuit concluded that the Spisak jury's sentencing instructions were improper under *Davis*, 318 F.3d at 689–90, the circuit's previous habeas corpus precedent applying *Mills* and *McKoy*, because the instructions did not explicitly tell jurors that they need not find mitigating factors unanimously, the verdict form required twelve signatures next to the sentencing verdict, and the instruction did not inform jurors that they need not unanimously reject a death sentence before imposing a life sentence. App. 44a–47a. In so holding, the Sixth Circuit ignored other circuit precedent upholding virtually identical instructions. See, e.g., *Coe v. Bell*, 161 F.3d 320 (1998).

The Sixth Circuit also found that counsel was constitutionally ineffective in closing argument because counsel abandoned his duty of loyalty to Spisak by denigrating him before the jury, by making only a "limited effort" to argue for a sentence less than death, by "rambling" on irrelevant matters, by suggesting that a verdict of death would be acceptable to the defense, and by going "so far as to tell the jury that [Spisak] was undeserving of mitigation." App. 36a–37a. In addition to finding counsel's performance deficient, the Sixth Circuit also stated conclusively, in one

sentence, that counsel's closing statements were prejudicial: "Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death, and may have voted for life instead." App. 38a–39a.

The State now respectfully requests certiorari review.

REASONS FOR GRANTING THE WRIT

The decision below, and the prior decision *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003) upon which it relies, misread *Mills* in two fundamental ways. First, the Sixth Circuit incorrectly read *Mills* as prohibiting a jury instruction or a jury verdict form that requires a unanimous conclusion on the *ultimate question* of whether aggravating factors outweigh mitigating factors. Second, the Sixth Circuit incorrectly read *Mills* as prohibiting a jury instruction suggesting jurors must reach a unanimous up-or-down conclusion on whether aggravating factors outweigh mitigating factors before they move on to consider non-capital sentences. But *Mills* does not clearly establish either of these rules, and indeed the logic of *Mills* does not even support such rules, as other circuit courts and other Sixth Circuit panels have already recognized. The Court's review is therefore necessary to ensure consistent understanding and application of *Mills*, as well as faithful application of the narrow AEDPA review standards.

Furthermore, in granting relief based on Spisak's ineffective assistance of counsel claim, the Sixth Circuit clearly exceeded its authority in federal habeas corpus. The Supreme Court of Ohio's rejection of Spisak's claim was not objectively unreasonable. As recognized by the district court, trial counsel's arguments obviously were based on a reasonable strategic decision to empathize with the jurors by acknowledging the horrific nature of Spisak's crimes, while asking the jurors to spare Spisak's life because Spisak's

"twisted mind" was the result of mental illness. The Sixth Circuit's contrary conclusion is not only clearly erroneous, but, as the basis for habeas corpus relief, "gives too little deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials." *Yarborough*, 540 U.S. at 11.

The Court should therefore grant the State's petition and reverse the Sixth Circuit's judgment.

A. In granting habeas corpus relief on Spisak's jury instruction claim, the Sixth Circuit misapplied Supreme Court precedent, exceeded its authority under AEDPA, and increased inter-circuit and intra-circuit conflict.

1. The decision below fundamentally misunderstood and misapplied the Court's holding in *Mills v. Maryland*.

The decision below, relying upon the circuit's prior decision in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), misread and misapplied *Mills v. Maryland* in order to grant habeas relief on Spisak's jury-sentencing-instruction claim. The Sixth Circuit's reasoning appears to rest on three theories: First, that an instruction requiring unanimity on the ultimate balance of aggravating versus mitigating factors improperly implies a unanimity requirement as to the presence or absence of specific individual mitigating factors. Second, that a verdict form requiring twelve signatures, i.e., unanimity, on the ultimate sentence likewise carries the same improper implication. Third, that an instruction requiring unanimity on the ultimate factor balance implies that a jury must unanimously reject a death sentence before considering other sentences, which, in turn, somehow "precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." See *Davis*, 318 F.3d at 689. *Mills* addresses none of these three factors, and none can properly form the basis of habeas relief for Spisak. Furthermore, the

Sixth Circuit's newly-created rules reflect a fundamental misunderstanding of *Mills*, calling for the Court's clarification.

A federal court may grant habeas corpus relief to a state prisoner on a claim previously adjudicated on the merits in state court only if the state court decision is contrary to or an unreasonable application of clearly-established United States Supreme Court precedent. 28 U.S.C. § 2254(d). In *Mills*, the Court established that a jury sentencing instruction in a capital case is unconstitutional if it leads a reasonable juror to believe that any mitigating factors not found unanimously by all twelve jurors must be ignored when the individual juror casts his or her ultimate sentencing vote. 486 U.S. at 370. The Court noted that a unanimity-in-mitigation-findings requirement could result in an absurd and troubling outcome, if, for example, all the jurors agree that some mitigating factors exist and that a life sentence is appropriate, but fail to agree on any specific mitigating factor. In such a case, a jury of twelve people favoring life would have to ignore all the mitigating factors in their final vote, and thus return a death sentence, simply because they disagreed on precisely which factors were present. *Id.* at 374.

Spisak's case differs starkly from the uniquely problematic sentencing scheme in *Mills*, as here the jury instructions simply required juror unanimity in the ultimate determination of whether aggravating factors found beyond a reasonable doubt outweighed any mitigating factors. The Spisak jury was instructed that if "all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, . . . then [the jury] must recommend to the Court that a sentence of death be imposed upon the defendant," but that if the jury finds "that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which [Spisak] has been found guilty of committing in the separate counts outweigh the mitigating

factors," then it should impose one of two life sentences. App. 262a–263a. Unlike the *Mills* jury, see 486 U.S. at 378, Spisak's jury was never instructed that it must unanimously conclude whether or not a particular mitigating factor had been shown. The Sixth Circuit thus failed to recognize the significant factual distinction between a jury instruction that requires unanimity in *specific mitigation findings* and an instruction that simply requires unanimity in *outcome*.

The Sixth Circuit's rule prohibiting unanimity-in-outcome instructions turns *Mills* on its head. The decision below, along with the prior decision in *Davis*, improperly forbade an instruction that requires jurors to agree unanimously on whether aggravating factors outweigh mitigating factors, for fear that a juror will misunderstand the instruction as requiring unanimous agreement on the existence or absence of particular mitigating factors. But no reasonable jury would understand the trial court's sentencing instruction here to mean that a jury must unanimously agree on a mitigating factor before a juror could consider it. Only a very strained and improbable reading of the instruction can transform a unanimity-in-verdict requirement into a unanimity-in-mitigating-factor requirement.

Similarly, the sentencing verdict form in Spisak's case, like the jury instruction, is entirely unproblematic under *Mills*. The verdict form used in this case differs markedly from the form the Court found problematic in *Mills*. In *Mills*, the jurors were required to render a yes-or-no answer under each potential mitigating factor, and all twelve jurors were required to sign the form. 486 U.S. at 378–379. Here, by dramatic contrast, the jurors were simply required to indicate by signature whether the aggravating factors ultimately outweighed any mitigating factors. App. 263a–264a. The Sixth Circuit describes this form as "misleading," but offers no analysis or support for this conclusion. App. 47a. Given that a unanimous sentencing verdict is not error in any way, it

makes no more sense to find error in a twelve-signature form that reflects a unanimous verdict.

Third, the lower court also created a new rule not contemplated by *Mills* when it found constitutional error in so-called "acquittal-first" jury sentencing instructions—that is, sentencing instructions that suggest a jury must unanimously acquit the defendant of death before imposing a life sentence. In *Davis*, the Sixth Circuit observed that under Ohio law, a deadlocked jury need not reach unanimity on the death penalty, but instead may proceed to return a unanimous noncapital sentence. 318 F.3d at 689 (citing *Ohio v. Brooks*, 75 Ohio St. 3d 148 (1996)). The *Davis* court then stated, without citation, that such a "non-unanimous mechanism" for preventing a death sentence was "constitutionally required," *Davis*, 318 F.3d at 689. The court also stated, again without citation or explanation, that an "instruction requiring that a jury must first unanimously reject the death penalty before it can consider a life sentence . . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills*." *Id.* In the decision below, the panel echoed this unsupported conclusion of *Davis*, stating that Spisak's so-called "acquittal-first" instruction was "improper" and "would have led a jury to apply an unconstitutional unanimity standard at all stages of the deliberative process." App. 47a.

Even if the Sixth Circuit were correct in reading Spisak's jury instruction as an improper "acquittal-first" instruction, this is a conclusion based solely on Ohio law, not federal constitutional law. Both in the present case and in *Davis*, the Sixth Circuit improperly confused *Mills*'s holding with Ohio court interpretation of Ohio law. The Sixth Circuit in both of its opinions concluded that the instruction at issue "not only 'could' but by its plain language 'would' lead a reasonable juror to conclude that the only way to get a life verdict is if the jury unanimously finds that the aggravating circumstances do not outweigh the mitigating

circumstances." App. 47a (quoting *Davis*, 318 F.3d. at 689–90). But even if a jury would attach the meaning that the Sixth Circuit imagined, the court never explained why this would be a constitutionally problematic reading. While an instruction requiring a jury to either unanimously accept or reject the death penalty might be an inaccurate statement of Ohio law, "the fact that [an] instruction was allegedly incorrect under state law is not a basis for habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 71–72 (1991).

In fact, *Mills* never says anything about whether a state may require unanimous agreement on the outcome of the death penalty balancing test before a jury chooses a non-capital sentence, and, in fact, the Sixth Circuit's holding on acquittal-first instructions is logically unrelated to the holding of *Mills*. In *Mills*, the jury instructions at issue created a procedural anomaly whereby juror disagreement on the presence or absence of a particular mitigating factor literally barred jurors from considering that factor when casting their vote on the ultimate sentencing issue. But here, by deliberating on the balance of mitigating and aggravating circumstances and reaching a consensus on the outcome of that balance, each juror *is* giving weight to mitigating evidence, and is performing the very type of individual analysis of mitigating factors that *Mills* is designed to protect. Thus, in overturning Spisak's sentence on the theory that it was imposed after an improper acquittal-first instruction, the Sixth Circuit's opinion reflects a deep misunderstanding of *Mills*'s requirement that juries be permitted to give weight to mitigating evidence.

Furthermore, Spisak's acquittal-first jury-instruction claim essentially reduces to an argument that the instruction is silent on the consequence of juror deadlock. Such an argument is true but irrelevant, since a claim based on the absence of a juror-deadlock instruction is not a basis for habeas relief. See *Jones v. United States*, 527 U.S. 373, 382 (1999).

Thus, the Sixth Circuit's decision below is not only wrong in its failure to apply AEDPA deference in evaluating the state-court jury instruction under *Mills*, but is so directly contradictory to the logic of Supreme Court precedent that certiorari review is warranted. The Court should reverse the Sixth Circuit's decision because the decision below misunderstood the holding of *Mills v. Maryland* in fundamental ways that require clarification.

2. The decision below failed to apply the deferential review mandated by AEDPA.

The Court should also accept review of the decision below to clarify that the deference accorded in habeas review to state-court determinations requires more than a mere recitation of the AEDPA standards.

Although the Sixth Circuit recited the AEDPA review standard at the opening of the opinion, the court's legal analysis of the petitioner's claims never reflects the application of, or recognition of, the standard previously recited. Rather, in its analysis of the petitioner's jury-instruction claim, the Sixth Circuit panel mistakenly identified its sole question as being "whether there is a reasonable likelihood that the jury has applied the challenged instructions in a way that violates the Constitution." App. 44a. Although this accurately states the standard of review for a direct-appeal jury instruction claim, the court overlooked the additional deferential review requirement for a federal court examining a post-AEDPA habeas claim by a state prisoner. See 28 U.S.C. § 2254. Specifically, the court should have asked whether it would have been contrary to *Mills*, or an unreasonable application of *Mills*, for a state court to conclude that the jury instruction was constitutionally defective. *Id.*

Second, the Sixth Circuit exhibited a failure to apply proper deference when it cited to authority prohibited by AEDPA. Spisak's conviction became final on March 6, 1989,

see 489 U.S. 1071 (denying certiorari review), and thus only Supreme Court cases decided before that date constitute the relevant precedent for determining whether the Ohio Supreme Court's decision was contrary to or an unreasonable application of federal constitutional law. See *Williams v. Taylor*, 529 U.S. 362 (2000) ("The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final."). The panel opinion properly cites to *Mills*, which the Court decided shortly before Spisak filed his certiorari petition. See App. 43a. But the panel opinion also cites to *McKoy v. North Carolina*, 494 U.S. 433 (1990), see App. 43a, which the Court did not decide until after Spisak's conviction became final. The decision below also relies heavily upon the prior circuit precedent of *Davis*, which, in turn, relied not only on *McKoy*, but also on several other decisions that came out after Spisak's conviction became final, including *Jones v. United States*, 527 U.S. 373 (1999) and *Boyde v. California*, 494 U.S. 370 (1990). The Spisak panel's failure to acknowledge that the timing of these opinions mattered suggests that it mechanically applied *Davis* without considering whether AEDPA required a different analysis.

The Sixth Circuit's failure to apply proper deferential review is evident not only from citation to improper authority and recitation of an improper standard, but also from the novel rules upon which its decision rests. Rather than applying the clear holding of *Mills* to evaluate the reasonableness of the Ohio Supreme Court's decision, the Sixth Circuit has improperly expanded and confused the *Mills* holding by invoking newly-created rules prohibiting "acquittal-first" instructions and requiring affirmative explanation, in both instruction and verdict form, of the jury's freedom to disagree about mitigating factors. As argued in Part A.1, such rules are not compelled by *Mills*, nor can they even be inferred.

The Sixth Circuit's failure to apply AEDPA review standards calls for the Court's reversal.

3. The decision below adds to inter-circuit and intra-circuit conflict on the proper scope of *Mills* in habeas review.

Finally, the Court should accept certiorari review of the decision below to resolve inter-circuit and intra-circuit conflict on the proper application of *Mills*. The decision below, as well as the decision in *Davis v. Mitchell* upon which it relies, conflict with the decisions of other circuits that have examined similar circumstances and found no *Mills* violation warranting habeas relief. They also directly conflict with the Sixth Circuit's own decisions in other cases that rejected Eighth Amendment challenges to virtually identical instructions. The Court should grant the State's petition to resolve this conflict.

Other federal circuit courts sitting in habeas review have examined unanimous-sentencing-verdict instructions that are virtually identical to Ohio's, and have repeatedly rejected the argument that *Mills* requires an affirmative explanatory instruction that the jury need not unanimously find mitigating factors. The Tenth Circuit recently examined a claim nearly identical to Spisak's, in which the petitioner argued that the unanimity instruction in other areas but silence on the need for unanimity regarding mitigating factors "erroneously implied that the jury was required to find a mitigating factor unanimously before each juror could consider the mitigating circumstance." *LaFevers v. Gibson*, 182 F.3d. 705, 719 (10th Cir. 1999). In rejecting the petitioner's claim, the Tenth Circuit reaffirmed that "a trial court need not . . . expressly instruct a capital sentencing jury that unanimity is not required before each juror can consider a particular mitigating circumstance." *Id.* (quoting *Duvall v. Reynolds*, 139 F.3d 768, 791 (10th Cir. 1998)). The Third Circuit, likewise, has found no *Mills* violation in its

examination of instructions nearly identical to those at issue here. See *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-08 (3d Cir. 1991). Other circuits have reached the same conclusions under *Mills*. See *Powell v. Bowersox*, 112 F.3d 966, 970-91 (8th Cir. 1997) (finding no *Mills* violation where "challenged instructions deal with balancing mitigating circumstances against aggravating factors, not with determining what mitigating circumstances exist"); *Arnold v. Evatt*, 113 F.3d 1352, 1363 (4th Cir. 1997) (no *Mills* violation where instruction required unanimous finding on aggravated factors but no unanimous instruction on mitigating factors); *James v. Whitley*, 926 F.2d 1433, 1448-49 (5th Cir. 1991) (same).

The Sixth Circuit's prohibition against acquittal-first sentencing instructions is also unparalleled in any other circuit in the country. Indeed, the only federal courts outside the Sixth Circuit to use the phrase have applied it to guilt-phase instructions that require rejection of a greater offense before consideration of a lesser-included offense. And these courts have found that a trial court may give an acquittal-first guilt-phase instruction without running afoul of the constitution, particularly if the defendant does not timely express a preference in instruction. See *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984); *United States v. Tsanas*, 572 F.2d 340 (2d Cir. 1978); *Catches v. United States*, 582 F.2d 453, 459 (8th Cir. 1978). And, to the extent Spisak's acquittal-first complaint is actually a request for affirmative instructions regarding the consequence of a jury's failure to agree on the death penalty, the opinion below is in clear conflict with numerous other circuits that properly apply the Court's *Jones* decision to this context. See, e.g., *Zettlemoyer*, 923 F.2d at 309; *United States v. Chandler*, 996 F.2d 1073, 1089 (11th Cir. 1993); *Lyons v. Lee*, 316 F.3d 528, 535 n.8 (4th Cir. 2003).

Furthermore, even the Sixth Circuit's application of its own precedent has been inconsistent. Some panels have noted that jury instructions like those at issue here were

originally upheld by the Sixth Circuit in cases such as *Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998) and *Henderson v. Collins*, 262 F.3d 615 (6th Cir. 2001), before more recent and thus non-binding precedent created inconsistency and obscurity in the governing law. See, e.g., *Scott v. Mitchell*, 209 F.3d 854, 876 (6th Cir. 2000). The Sixth Circuit has repeatedly acknowledged the confusion among its own opinions. See, e.g., *id.*; *Williams v. Anderson*, 460 F.3d 789, 810-13 (2006).

The Court should therefore grant certiorari review to correct the Sixth Circuit's mistaken reading of *Mills*, to enforce proper deferential habeas review standards, and to resolve the inter- and intra-circuit conflicts in *Mills*'s application.

B. In granting habeas corpus relief on Spisak's ineffective assistance claim, the Sixth Circuit ignored trial counsel's strategy and exceeded its authority under AEDPA.

The Sixth Amendment requires that a criminal defendant receive the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). However, "[j]udicial scrutiny of a counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. To obtain habeas corpus relief, a prisoner

> must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under [28 U.S.C.] Section 2254(d)(1) it is not enough to convince a federal habeas court that, in its independent judgment, the state court decision applied *Strickland* incorrectly. Rather, he must show that [the state court]

> applied *Strickland* to the facts of his case in an objectively unreasonable manner.

Bell v. Cone, 535 U.S. 685, 698-99 (2002), citing *Williams v. Taylor*, 529 U.S. at 411.

This deference applies all the more to a counsel's closing arguments. While the constitutional right to effective assistance extends to closing arguments, "[n]onetheless counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough*, 540 U.S. at 5-6. "Indeed, it might sometimes make sense to forgo closing argument altogether." *Id.* at 6, citing *Bell v. Cone*, 535 U.S. at 701-02 (state court's assessment that waiving closing argument could be considered sound trial strategy and "at the very least . . . was not unreasonable." See also *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (state court was objectively reasonable in concluding that defense counsel's "multiple concessions" during closing argument did not mean that counsel was constitutionally ineffective).

The Court has already reversed the grant of habeas corpus relief based on closing arguments that depicted the defendant more negatively than in Spisak's case. In *Yarborough*, the Ninth Circuit censured counsel's description of his client as a "bad person, lousy drug addict, stinking thief, jail bird," and criticized counsel for confessing to the jury that counsel himself could not be sure of the truth. Summarily reversing the Ninth Circuit's judgment, the Court observed that by admitting his client's shortcomings, counsel might have convinced the jury to put aside facts they would have remembered in any event. And, as the Court further observed, there was nothing wrong with counsel echoing the doubts that the jurors might have, because indicating that the speaker shares the listeners' attitudes and thereby "winning

over an audience by empathy" is a long-recognized technique. 540 U.S. at 9, 11.

In Spisak's case, the circumstances of defense counsel's challenged actions speak for themselves. Counsel had no choice but to concede that Spisak was the perpetrator of a series of fatal shootings that terrorized the campus of Cleveland State University. Added to the brutal and senseless nature of the murders, the prosecution presented compelling evidence that Spisak's racial hatred and Nazi beliefs motivated his crimes. Manifest in counsel's closing argument is an obvious attempt to gain the trust of the jurors by empathizing with their likely revulsion by the brutal and senseless nature of the shootings and the reprehensibility of Spisak's Nazism. Counsel's theme was that everyone participating in the trial was affected by Spisak's crimes. Repeatedly framing his comments in terms of "us" and "we," counsel argued that "none of us" could forget the day that Horace Dickerson was found dead, that "we can go back to Cleveland State University, and we were there," and that "you and I and everyone of us, we were sitting in that bus shelter," App. 272a–273a.

Counsel then argued that although Spisak did not lead a "good life" and had no "good deeds" to his credit, Spisak's mental illness was a mitigating factor that the jurors should consider. App. 275a. Again, counsel framed his approach in terms of a common interest with the jurors, arguing that "we are a humane society," that "the reason we have this hearing is because we are a humane people;" that "if you can't intend to commit a sin, to break the law, then as a humane people, different than most other countries, we don't terrorize one who can't intend to commit an offense;" and that this was also "the reason our general assembly has put this mitigating factor . . . not sane enough to be criminally insane, but sick and demented so that the ability to intend is substantially reduced." App. 276a–277a.

Counsel also argued extensively, using the metaphor of jars of three different sizes, that although the defense's expert testimony was insufficient to meet the test for incompetence to stand trial or the test for legal insanity, it was more than sufficient for the jury to conclude that Spisak was substantially impaired by mental illness and that this mitigating factor outweighed the admittedly strong aggravating circumstances. App. 278a–288a. Counsel specifically reviewed the testimony of defense experts that established the statutory mitigating factor, App. 279a, 287a–289a, and specifically argued that the jury must find this mitigating factor to "outweigh the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us." App. 278a.

Finally, counsel responded to arguments he expected the prosecution to make, and concluded by assuring the jurors that he was proud of them for doing their duty. Counsel obviously anticipated that the prosecution would emphasize the defense's failure to establish an insanity defense during the guilt phase. Counsel argued specifically that "what we did . . . or what we didn't do, that isn't an issue[,] but the issue is, and rather obviously, that the mental inability of Frank Spisak, that description as described by Dr. McPherson, Dr. Bertschinger, and Dr. Markey, is that a mitigating factor, and does that factor outweigh the aggravating circumstances." App. 280a. Counsel also sought to repair damages that the prosecutor may have inflicted via cross-examination of the defense's experts, particularly with respect to an exchange during which Dr. Markey appeared to confuse an assistant prosecutor who interviewed him before trial with a member of the defense team. App. 284a-285a.

The Sixth Circuit failed to apply the appropriate deference to counsel's performance when it concluded that "there cannot be any objectively reasonable tactical reason" for the arguments he made in closing. See App. 38a. The Sixth Circuit's findings are based on a selective view of the

record that typifies the hindsight approach condemned by *Strickland*. As the district court concluded, each of counsel's alleged errors "can easily be attributed to a trial strategy." App. 154a. For example, the Sixth Circuit criticized counsel's arguments that Spisak had not earned the jurors' sympathy, that Spisak had no "good deeds" to his credit, and that Spisak was "sick," "twisted" and "demented," App. 37a, but counsel's comments were made in the context of arguing that "good deeds" or a "good life" were not the only grounds for mitigation, and that Spisak's incapacity due to mental illness was a substantial mitigating factor that could outweigh the aggravating circumstances. Although the Sixth Circuit further criticized counsel for "rambling incoherently towards the end of the closing statement about integrity in the legal system," counsel's arguments about the legal system could well have been in response to the prosecution's earlier statements that Spisak was responsible for putting the jurors and survivors through the ordeal of a lengthy and emotionally-charged trial. Indeed, this is the natural reading of counsel's comments that "none of us had any choice in that matter, we had to go through with it," because counsel "didn't sit down before this trial and invent the presumption of innocence." App. 281.

The Sixth Circuit also incorrectly found that counsel erred by going "so far as to tell the jury that [Spisak] was undeserving of mitigation." App. 36a. The Sixth Circuit failed to cite the record for this finding; there is no statement by counsel in the closing argument that Spisak "was undeserving of mitigation." Rather, as noted above, counsel brought out Spisak's lack of "good deeds" and his failure to lead a "good life" in the context of arguing that despite Spisak's terrible crimes and reprehensible beliefs, his mental illness was a significant mitigating factor that outweighed the aggravating circumstances. Indeed, it is difficult to understand the Sixth Circuit's apparent belief that counsel could and should have attempted to portray Spisak more

sympathetically, because, as recognized by the district court, any attempt to minimize Spisak's crimes was fraught with the danger of jury backlash.

The Sixth Circuit also misleadingly characterizes the record when it states that "most shocking of all, . . . trial counsel suggested to the jury that either outcome, death or life, would be a valid conclusion." App. 37a. The Sixth Circuit's findings ignore the context in which counsel's arguments were made. Counsel sought to sympathize with the jury's emotional response to sitting through such a difficult trial, again using the pronouns "we" and "us," and stating that the trial would "leave us a little bit older, . . . a little bit more jaded, and a little bit more hurt." App. 293a. Further, counsel never stated that a death verdict would be a proper outcome; rather, counsel spoke of being proud of the jury for fulfilling their jury duty, because he recognized it was a difficult task. Specifically, counsel stated that "whatever you do, we can be proud because we lived up to the oath that we took." App. 293a. Finally, as the Court observed in *Yarborough*, it is acceptable for counsel to argue in a way that stresses the jury's autonomy and that does not suggest that the verdict must be in the defendant's favor. *Yarborough*, 540 U.S. at 10.

Even if the Sixth Circuit had been correct in its analysis of *Strickland*'s deficient-performance prong, Spisak did not and could not demonstrate the prejudice required under *Strickland*. Spisak was required to show, based on an objective review of the totality of the evidence, a reasonable probability that but for counsel's errors the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death. *Strickland*, 466 U.S. at 695-696. The Sixth Circuit concluded, in a single sentence, that "[a]bsent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness

of death, and may have voted for life instead." App. 38a–39a. While paying lip service to the *Strickland* prejudice test, the Sixth Circuit's subjective assessment ignores the overwhelming aggravating circumstances proven by the State, as well as counsel's lengthy argument urging the jury to consider the mitigation presented by the defense.

Finally, even if the Sixth Circuit's conclusions could be seen as a reasonable interpretation of the record, the Ohio court certainly was not objectively unreasonable in reaching the opposite conclusions. Indeed, notably absent from the Sixth Circuit's decision is an express determination that the Supreme Court of Ohio was objectively unreasonable in denying Spisak relief. Although it did not explain its decision, the Supreme Court of Ohio adjudicated the merits of Spisak's ineffective assistance of counsel claims, and, hence, its decision was subject to the standard of deference applicable in federal habeas corpus. *Harris v. Stovall*, 212 F.3d 930, 943 (6th Cir. 2000) (standard of deference applies even where state court decides a constitutional issue by form order or without extended discussion); *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999) (noting decisions of the 4th, 5th, and 7th circuits holding that a summary decision can constitute an adjudication on the merits for purposes of § 2254(d), provided that the decision was reached on substantive rather than procedural grounds); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) (recognizing that to condition "reasonableness" or "unreasonableness" on the quality of a state court's reasoning, rather than its result "would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end").

In sum, the Sixth Circuit clearly exceeded its authority in federal habeas corpus by overturning the district court and granting Spisak relief.

CONCLUSION

For the above reasons, the Court should grant the State's petition and reverse the Sixth Circuit's decision.

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May 16, 2007

Supreme Court, U.S.
FILED
06-1535 MAY 16 2007
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

FRANK G. SPISAK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0388p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK G. SPISAK, JR.,
Petitioner-Appellant,
v.

BETTY MITCHELL, Warden,
Respondent-Appellee.

No. 03-4034

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 95-02675—Solomon Oliver, Jr., District Judge.

Argued: March 14, 2006

Decided and Filed: October 20, 2006

Before: MARTIN, MOORE, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Alan C. Rossman, Cleveland, Ohio, for Appellant. Carol Ann Ellensohn, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellee.

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CLAY, J., delivered the opinion of the court, in which MARTIN, J., joined. MOORE, J. (pp. 28-30), delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. This appeal is brought by death-sentenced Ohio prisoner, Frank G. Spisak, Jr., from the judgment of the district court dismissing Defendant's application for a § 2254 writ of habeas corpus. Defendant challenges his sentence and convictions on the following grounds: (I) that the trial court improperly struck the testimony and reports of expert witnesses and refused to submit Defendant's insanity defense to the jury; (II) his trial counsel rendered ineffective assistance during the mitigation phase of his trial; (III) the unanimity and "acquittal-first" jury instructions infringed Defendant's constitutional rights; (IV) there was a Clemons violation where the trial court upheld Defendant's death sentence after re-weighing the aggravating and mitigating circumstances; and (V) that there was prosecutorial misconduct during various stages of the culpability and mitigation phases of the trial.

For the reasons set forth below, we **AFFIRM** in part and **REVERSE** in part. We **AFFIRM** the judgment of the district court as it relates to issues I, IV, and V, but we **REVERSE** the district court's judgment as to issues II and

III, and **REMAND** with instructions to grant Defendant's petition as to these issues.

BACKGROUND

I. Procedural History

On March 29, 1983, the Cuyahoga County Grand Jury indicted Defendant Spisak on four counts of aggravated murder in violation of Ohio Rev. Code § 2903.01; three counts of aggravated robbery in violation of Ohio Rev. Code § 2911.01; one count of attempted murder in violation of Ohio Rev. Code § 2903.02; and one count of receiving stolen property in violation of Ohio Rev. Code § 2913.51. Pursuant to Ohio Rev. Code § 2929.04(A), the aggravated murder counts contained nineteen death penalty specifications.

Defendant pled not guilty by reason of insanity, claiming to be a follower of Adolf Hitler, as to all counts on April 8, 1983. Before trial, the court ordered Defendant to be evaluated by Dr. Phillip Resnick ("Resnick"), to determine his competency to stand trial. Defendant also requested, and was granted psychiatric evaluations by four other psychiatrists: Dr. Sandra McPherson ("McPherson"), Dr. Kurt Bertschinger ("Bertschinger"), Dr. S.M. Samy ("Samy"), and Dr. Oscar Markey ("Markey"). Thereafter, the trial court held a competency hearing, wherein it was determined, based on Resnick's recommendation, that Defendant was competent to stand trial.

A jury convicted Defendant on July 27, 1983 of all counts and specifications, except for one of the aggravated robbery counts. After the mitigation phase of the trial, the jury recommended a sentence of death, which was accepted by the trial court, and Defendant was sentenced to death on August 10, 1983. Defendant was also sentenced to terms of seven to twenty-five years imprisonment on each attempted murder and aggravated robbery conviction.

Defendant timely appealed his convictions and sentence to the Ohio Court of Appeals for the Eighth District. The court found that Defendant was improperly convicted of two counts of aggravated murder for the death of Timothy Sheehan, and vacated one of the two convictions. The court affirmed the conviction and death sentence on the other aggravated murder charges, as well as the five specifications attached thereto, leaving Defendant with three aggravated murder convictions, and fifteen death penalty specifications. *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992 (Ohio Ct. App. 1984).

After a number of intervening appeals to the Eighth District Court of Appeals, and requests for remand to the Ohio Supreme Court, Defendant finally filed his merits brief with the Ohio Supreme Court on November 24, 1986, in which he raised sixty-four proposed errors of law. The Ohio Supreme Court issued an abbreviated opinion on April 13, 1988, affirming Defendant's convictions and sentence. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988).

Defendant then petitioned the U.S. Supreme Court for a writ of certiorari, but the petition was denied. *Spisak v. Ohio*, 489 U.S. 1071 (1989). Defendant spent the next six years filing and appealing denials of countless motions for post-conviction relief.

On December 15, 1995, Defendant filed a Notice of Intent to File a Petition for Writ of Habeas Corpus with this Court. Subsequent to filing the petition, Defendant filed a motion with this Court on June 13, 1997 to stay his execution, which was granted.

Defendant filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 9, 1997, raising thirty-three grounds for relief. The district court issued an Opinion and Order denying the petition on April 18, 2003, but the court granted Defendant a certificate of appealability as to

thirteen of his claims. Defendant filed a Rule 59 motion to alter or amend judgment on July 29, 2003. In response to that motion, the district court granted an additional certificate of appealability as to one sub claim. Defendant timely appealed to this Court on July 31, 2003.

II. Factual History

In its rejection of Defendant's direct appeal, the Ohio Supreme Court set forth binding factual findings with respect to the overwhelming evidence adduced at Defendant's trial. Under 28 U.S.C. §2254(e)(1), Defendant has "the burden of rebutting the presumption of correctness by clear and convincing evidence." Defendant does not challenge these factual findings, so we adopt them below.

> On February 1, 1982, the body of the Reverend Horace T. Rickerson was discovered by a fellow student on the floor of a restroom on the Cleveland State University campus. Rickerson had been shot seven times by an assailant from a distance of more than eighteen inches. Four spent bullet casings were recovered from the scene.
>
> On the evening of June 4, 1982, John Hardaway was shot seven times while waiting for an RTA train at the West 117th Rapid Station in Cleveland. He observed a man walking up the platform steps and had turned away when the man opened fire on him. Hardaway survived the shooting, and was later able to identify his assailant as the appellant, Frank G. Spisak. Three pellets and seven shell casings were recovered from the scene.

At approximately 5:00 p.m. on August 9, 1982, Coletta Dartt, an employee of Cleveland State University, left her office to use the restroom. Upon exiting the stall, she encountered the appellant, holding a gun, who ordered her back into the stall. Instead, Dartt shoved appellant out of the way and ran down the hallway. Appellant shot at her, but missed. A pellet was later removed from a wall in the hallway. Dartt identified the appellant as her assailant.

On August 27, 1982, the body of Timothy Sheehan, an employee of Cleveland State University, was discovered in a restroom at the university by a security guard. The guard had been searching for Sheehan after his office reported that he had failed to answer his beeper page. Sheehan had been shot four times, and two pellets were retrieved from the scene.

On the morning of August 30, 1982, the body of a young student, Brian Warford, was discovered in a bus shelter on the campus of Cleveland State University. Warford died from a single gunshot wound to the head, although five spent .22 caliber casings were recovered from the scene.

On September 4, 1982, Cleveland police answered a call that a man was firing shots from a window at 1367 East 53rd Street. The police were directed to appellant's apartment and appellant, after admitting he had fired one shot, invited the officers inside. A shotgun and a .22 caliber automatic pistol were observed in

the room. Appellant made a suspicious move toward the couch but was stopped by one of the officers who discovered a loaded .38 caliber handgun and a two-shot derringer under the couch cushions. Appellant was arrested for possession of unregistered handguns and discharging firearms within city limits, but was later released on bond. The weapons, however, were confiscated. Early the next day, an anonymous caller told police that the confiscated weapons had been used in the Cleveland State University shootings. Ballistics tests confirmed the tip. A warrant was obtained, and the police returned to Spisak's apartment, confiscating several items including newspaper clippings of the homicides and Nazi-White Power paraphernalia. Appellant was later arrested, hiding in the basement of a friend's house. During a brief search of appellant's suitcase at the scene, police discovered the beeper pager belonging to Sheehan.

Appellant later admitted to shooting Rickerson for allegedly making a homosexual advance toward him; to killing Sheehan as a possible witness to the Rickerson shooting; to killing Warford while on a "hunting party" looking for a black person to kill; and finally, to shooting at Dartt and to shooting Hardaway. He also told police he had replaced the barrel of the .22 caliber handgun in order to conceal the murder weapon.

Spisak, 521 N.E.2d at 800-01.

STANDARD OF REVIEW

In habeas appeals, we review the district court's legal conclusions de novo and the factual findings for clear error. *Jordan v. Hurley*, 397 F.3d 360, 362 (6th Cir. 2005). However, following the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1) (2000). The inquiry is "limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time [the defendant's] conviction became final." *Onifer v. Tyszkiewicz*, 255 F.3d 313, 317-18 (6th Cir. 2001). For purposes of 28 U.S.C. § 2254(d)(1), "clearly established law . . . 'refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision.'" *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

A state court decision can be "contrary to" "clearly established federal law" if it applies a rule that contradicts the governing law set forth in Supreme Court cases; or the state court decision confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from Supreme Court precedent. *Williams*, 529 U.S. at 405; *Bailey v. Mitchell*, 271 F.3d 652, 656 (6th Cir. 2001). The state court decision

constitutes an "unreasonable application" of "clearly established federal law" where the state court identifies the correct governing legal rule from the Supreme Court's cases but unreasonably applies it to the facts of the particular state prisoner's case; or the state court either unreasonably extends a legal principle from a Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply. *Williams*, 529 U.S. at 407; *Bailey*, 271 F.3d at 655. A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, 529 U.S. at 411. Rather, the issue is whether the state court's application of clearly established federal law is "objectively unreasonable." *Id.* at 409.

AEDPA requires heightened respect for state court factual findings and legal determinations. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the Defendant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

DISCUSSION

I. Not Guilty By Reason of Insanity Defense

Defendant sought to present an insanity defense to the jury during the guilt phase of his trial, but the trial court disallowed the defense by: (1) striking the testimony of Defendant's expert, Markey; (2) refusing to allow any other experts to testify as to Defendant's sanity; and (3) refusing to instruct the jury as to an insanity defense. Defendant raised this issue on direct appeal to the Ohio Eighth District Court of Appeals, which found that the trial court did not err in striking Markey's testimony since it did little to alter the presumption that Defendant was sane, and was likely to have

confused the jury on the issue. *Spisak*, 1984 WL 13992, at *5. The Eighth District Court of Appeals further found that Defendant was not entitled to a jury instruction on the insanity defense because Defendant had failed to meet his burden of going forward with evidence of legal insanity. *Id.* at *6. The Supreme Court of Ohio summarily affirmed the Court of Appeal's decision. *State v. Spisak*, 521 N.E.2d at 800. On habeas review, the district court agreed with the Eighth District Court of Appeals that Markey's testimony would not aid Defendant's insanity defense, and thus, that Defendant's constitutional rights were not violated by the exclusion of the testimony. The district court further found that Defendant was not entitled to a jury instruction on the defense. Defendant now appeals to this Court claiming that the district court erred in finding that Defendant was not denied a fair trial by the exclusion expert testimony and evidence related to Defendant's insanity defense, and that the trial court did not violate clearly established federal law in refusing to submit Defendant's insanity defense to the jury.

A. Exclusion of Expert Testimony and Evidence

Defendant first argues that the district court infringed his fundamental right to a fair trial by striking the testimony of his expert, Markey, and by excluding testimony and evidence from other experts related to Defendant's insanity defense. While it cannot be disputed that Defendant has a fundamental right to a fair trial, we do not agree that this right was infringed by the state trial court's evidentiary ruling excluding what it considered to be irrelevant and potentially prejudicial expert evidence.

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal citations and quotations omitted). Having the opportunity to be heard is an essential component of procedural fairness. *Id.* Being allowed to present "relevant evidence is integral to that

right." *Baze v. Parker*, 371 F.3d 310, 323 (6th Cir. 2004) (citing *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988) for the proposition that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive").

Federal courts have long recognized, however, that "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (citations omitted). A defendant's interest in relevant evidence "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Rock v. Arkansas*, 483 U.S. 44, 55 (1987) (citations omitted) ("In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."). "As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer*, 523 U.S. at 308 (quoting Rock, 483 U.S. at 56).

The Supreme Court has, moreover, "found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." *Id.* (citing *Rock*, 483 U.S. at 56; *Chambers*, 410 U.S. at 302; *Washington v. Texas*, 388 U.S. 14, 22-23 (1967)). "Only if an evidentiary ruling is so egregious that it results in a denial of fundamental fairness does it violate due process and thus warrant habeas relief." *Baze*, 371 F.3d at 323 (internal citations and quotations omitted); see also *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003) ("Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they offend

some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (internal citations and quotations omitted)).

In *Crane*, the Supreme Court dealt with this issue of reviewing state evidentiary rules and explicitly

> acknowledge[d] [its] traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence . . . the Constitution leaves the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive . . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues'

Crane, 476 U.S. at 689-90 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). The Court further recognized that the States have the power "to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see that evidence admitted."[1] *Id.* at 690 (citations omitted).

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[1] The *Crane* Court held, however, that "without 'signal[ing] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures,'" under those circumstances, where the trial court had excluded evidence of the surrounding circumstances of a defendant's confession, that "the blanket exclusion of the proffered testimony about the circumstances of Defendant's confession deprived him of a fair trial." *Id.* at 690 (citations omitted).

i. Markey's Testimony

After conducting four sessions with Defendant, Dr. Oscar Markey, one of several psychiatric experts retained by Defendant's trial counsel, submitted a report in which he diagnosed Defendant as suffering from a schizotypal personality and latent atypical psychotic disorder. Markey opined in his report that Defendant would not have been able to control his impulse to assault his victims, even though he knew that it was considered wrong by society. In light of this report, Defendant's trial counsel called Markey to testify at trial in support of the defense's contention that Defendant was insane at the time of the shootings.

Prior to allowing Markey to testify before the jury, however, the trial court conducted a fairly extensive voir dire in which Markey was questioned about his conclusions as to Defendant's mental state. During the voir dire, Markey testified that Defendant suffers from a "schizotypal personality disorder" and "atypical psychotic disorder," but that he could not say that Defendant was psychotic at the time of the killings. Markey later stressed that Defendant has a "latent psychotic condition," repeatedly emphasizing in response to questions from defense counsel as to whether Defendant suffered from a mental illness, that Defendant's mental illness was "latent" and that the "potential is there," but that Defendant "cannot be diagnosed as having an active psychotic illness." (J.A. at 1990-91.) When asked whether Defendant knew that what he did was wrong, Markey replied, "[i]n our society . . . I know that he knows that we believe it is wrong, and that in this society in which he is trying to cure these ills, society thinks what he did was wrong," but "in his view he did the right thing and there is nothing to apologize for." (J.A. at 2000.)

When defense counsel asked whether Defendant could refrain from these acts, Markey gave a long, rambling, and confusing answer that prompted several more questions

from counsel, but he eventually replied that "certainly, there are times when he would refrain, and I think he must have refrained in the past from acts like this because the consequences might be uncomfortable for him." (J.A. at 2007.) Markey then contradicted himself when asked whether Defendant was unable to refrain from killing blacks and Jews, and responded that it would seem that Defendant was unable to refrain from killing blacks and Jews. Markey then read from his report in which he stated that Defendant was "unable to control his impulses to assault, though he was at the time, aware of its being socially wrong." (J.A. at 2009-10.)

On cross examination, the prosecution challenged Markey on his theory that Defendant did not know the wrongfulness of his conduct.

> Q. Do you know what the legal test for insanity is?
>
> A. Yes.
>
> Q. What is that?
>
> A. Did he know right from wrong, was he able to control any impulses which would have interfered with his knowledge of right from wrong.
>
> Q. And would he be – or was he able to refrain from committing the acts that he committed.
>
> A. It was obvious, I think he knew the difference, but remember he is changing the world by this act.
>
> Q. Well, if you believe what he says, that he killed the Reverend because the Reverend

made a homosexual pass, you would agree that has nothing to do with his Nazi theory?

A. That's right.

Q. You also agree that he refrained from killing any Jews because as far as we know, he is not charged with killing any Jews?

A. Because of what?

Q. He has not killed any Jews. Even if he espouses the philosophy of killing Jews, he has not done so. Therefore, we can conclude that he has refrained from killing the Jews. Fair enough?

A. Yes.

Q. I don't think we have any disagreement. You do say in all of the instances he knew the difference between right and wrong, and you do say in all of the instances he was able to refrain from committing those acts if he would have decided to refrain from doing it?

A. Yes.

(J.A. at 2012-13.) After admitting that Defendant knew the difference between right and wrong, and was able to refrain from his conduct, Markey later further contradicted his earlier conclusion that Defendant could not refrain from killing blacks and Jews by conceding on re-cross examination that he essentially agreed with the conclusion of another expert, Resnick, that "defendant knew the difference between right and wrong and that he was able to refrain." (J.A. at 2027-28.) Despite these damaging and contradictory admissions, however, the trial court ruled that Markey's conclusion that defendant could not control his impulse to

assault created a question of fact for the jury, and decided to allow Markey to testify.

Once he was before the jury, Markey repeated his conclusions that Defendant suffered from a "schizotypal personality disorder" and a "possibility of a breakdown, which could equate mental illness." (J.A. at 2074.) Again, however, Markey still would not directly answer "yes" or "no" as to whether Defendant had a mental disease, but instead kept referring to the "potential," while conceding that Defendant did not "have an active mental disease." (J.A. at 2079.) At this point, the trial court excused the jury for an extensive sidebar, during which time the judge, in an effort to ascertain Markey's actual position on the issue of Defendant's sanity, asked Markey several direct questions about his diagnosis of Defendant.

> Q. Doctor, in your opinion, obviously, it is based on reasonable medical certainty, does Mr. Spisak have a mental disease, actively present?
>
> A. Actively, no.
>
> Q. Presently does he have a mental disease?
>
> A. No.
>
> Q. At the time these various crimes were committed, February 1, 1982 through August 3, 1982, is it your opinion based on reasonable medical certainty that Mr. Spisak had a mental disease at that time?
>
> A. On the basis of what I know, no.

(J.A. at 2080.) The judge then recalled the jury, and defense counsel was allowed to continue questioning Markey. On cross examination, the prosecution first got Markey to reaffirm that Defendant does not have a mental disease,

stating "so, we can put that aside, mental disease and mental defect aside, and we agree that he does not have either one of these at this point, or in the past that you know of, correct?" (J.A. at 2090.) Markey answered in the affirmative. Later towards the end of the cross-examination, the following exchange occurred, at which time Markey restated that Defendant could refrain from killing:

> Q. All I'm indicating to you, doctor, and asking for your opinion is that he made a conscious decision to shoot, or not to shoot on each case that we have in this indictment?
>
> A. Yes, he was not in a frenzy where he didn't know what he was doing. He had a conception of what he was doing and he realized that he could have –
>
> Q. He could have refrained from pulling the trigger on any of those five, had he chosen to do so?
>
> A. Yes.

(J.A. at 2096.) Although Defendant's trial counsel then tried to rehabilitate Markey's testimony, it only proved to be further damaging when Markey stated on re-direct:

> The questions have been asked me before, indicate that in every instance in which he did assault, whether he killed or not, he was calculating and knew whether or not he could go ahead, in his view, he was positive in doing it, that he had enough conscious control over it to do it at a time when it would be to his advantage. . . .

(J.A. at 2097-98.)

The following morning, the prosecution filed an objection to the continuation of Markey's testimony on

relevancy grounds, since Markey testified that Defendant did not suffer from a mental disease or defect at the time of the acts, and that Defendant knew the difference between right and wrong and was able to conform his conduct to the requirements of law. The prosecution moved that the testimony not continue and that it be stricken because it prejudiced the defense in that it reestablished the presumption of sanity, and because it did not add anything and was not relevant to the issue since the law already presumes sanity. The prosecution further moved that the defense be required to withdraw its plea of not guilty by reason of insanity because there was not "one scintilla of evidence offered that the defendant is anything but sane, and was anything but sane at any of the times in the five charges or five indictments." (J.A. at 2103-04.) After hearing arguments from both sides, the trial court granted the prosecution's motion, reasoning that when a plea of not guilty by reason of insanity is entered, the expert offered by the defendant "must meet a certain minimal standard," which the court concluded had not been met in this instance. (J.A. at 2118.)

Upon review of the transcript of Markey's testimony, we agree with the district court that the exclusion of Markey's testimony did not violate Defendant's fundamental right to a fair trial. At the outset, we would like to note that this Court addressed a similar issue in the pre-AEDPA case, *Matlock v. Rose*, 731 F.2d 1236 (6th Cir. 1984). The defendant in *Matlock* appealed the district court's denial of his habeas petition, challenging the trial court's exclusion of a psychologist who testified that defendant Matlock knew right from wrong only on the intellectual level of an eight or nine year old. Id. at 1238. We rejected defendant's argument that "the exclusion of this testimony deprived him of his only defense, that of insanity," finding instead that the testimony proffered would not have supported an insanity defense under Tennessee law, and would in fact have probably

undercut one. *Id.* at 1243 ("The evidence excluded . . . would not have made out a case of insanity . . . . At best, it would have shown that Matlock was retarded with some brain damage.").

We find the situation in *Matlock* to be somewhat analogous to the present case, and therefore conduct a similar analysis, beginning with Ohio's legal definition of insanity, and proceeding to consideration of whether the evidence proffered by Dr. Markey would have established that Defendant met this standard. We conclude that it would not have.

Under Ohio law, as it stood at the time of Defendant's trial, a person accused of a crime could be found to be "not guilty by reason of insanity" if "at the time of such conduct as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law."[2] *State v. Staten*, 247 N.E.2d 293, 296 (Ohio 1969). As illustrated by the above-recounted excerpts, far from establishing that Defendant "had a mental disease or defect" and "did not know the wrongfulness of his conduct," Markey repeatedly stated that Defendant did not have a "present" mental defect or disease, and that Defendant knew the wrongfulness of his

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[2] Defendant correctly argues that the district court applied the wrong standard for an insanity defense under Ohio law at the time of his convictions. The district court utilized the standard for insanity set forth at Ohio Rev. Code § 2901.01(a)(14), which provides that "a person is 'not guilty by reason of insanity' relative to a charge of an offense only if he proves . . . that at the time of the commission of the offense, he did not know, as a result of a severe mental disease or defect, the wrongfulness of his conduct." This was the incorrect standard because this definition of insanity did not take effect until 1990, seven years after Defendant's trial in 1983. Although this was the wrong standard, the district court's analysis of the issue of the admissibility of Markey's testimony and ultimate conclusion is still correct.

conduct. Thus, Markey's testimony could not have supported Defendant's insanity defense, and in fact, even more so than was the case in *Matlock*, would likely have severely undercut such a defense since Markey explicitly diagnosed Defendant as not meeting the necessary elements of the insanity defense under Ohio law.

We also agree with the Eighth District Court of Appeal's conclusion that "there was a high probability that [Markey's] testimony would have confused the issue in the minds of the jurors and would not have aided the jury in understanding the evidence or in reaching a determination an legal sanity." *Spisak*, 1984 WL 13992, at *5 ("[W]hen a defendant calls an expert to testify on the issue of legal insanity, that expert's testimony must still meet the basic requirements of the Rules of Evidence.").[3] Markey's testimony was often contradictory and inconsistent. He opined that Defendant did not consider his actions to be

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[3] In deciding the issues on appeal, the Ohio Eighth District Court of Appeals cited to the following rules of evidence:

> Rule 403:
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> (A) Exclusion Mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, or confusion of the issues, or of misleading the jury.
>
> (B) Exclusion Discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.
>
> Rule 702:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

wrong because he was ridding the world of bad persons, but that Defendant knew that society considered his actions to be wrong. Markey first stated that Defendant could not refrain from killing blacks and Jews, but then contradicted himself on cross examination, admitting that Defendant could and did in fact refrain at times from engaging in such conduct. Markey also thought the Defendant was a schizotypal personality, but that Defendant had only a "latent" mental disease or defect, not one that was "actively present." For the most part, it is difficult for this Court, let alone a jury, to discern whether Markey actually believed that there was a clinical diagnosis for what was wrong with Defendant. It does seem blatantly apparent from his testimony, however, that Markey did not believe that Defendant met the legal definition of insanity under Ohio law. Therefore, Defendant's fundamental rights were not infringed by the trial court's decision to exclude Markey's testimony.

ii. Other Expert Reports and Evidence

We similarly agree with the district court that the trial court properly excluded the other expert reports where all of the experts opined that Defendant knew the wrongfulness of his conduct when he carried out the shootings. After the district court excluded Markey's testimony, the defense proffered Exhibits D through K, which included expert reports from doctors Markey, Resnick, McPherson, Bertschinger, Samy, Williger, and Althof, contending that these doctors would testify to Defendant's sanity and "would give a better profile of the characteristics and personality of the defendant Frank Spisak such that the Court would at that time charge on the issue of sanity to the jury." (J.A. at 2121.) A detailed review of the proffered reports show, however, that none of the doctors concluded that Defendant met the standard for insanity under Ohio law. Resnick concluded, first, that Defendant did not have a mental disease or defect at the time of the crimes, and second, that he "knew the

wrongfulness and was able to refrain from each of the acts . . . charged." (J.A. at 3204.) McPherson made the following diagnosis:

> Mr. Spisak's functioning at this time is nonpsychotic, although he has potential for deterioration under condition of minimal stress of [sic] even in situations where there is lacking adequate external control . . . his accounts of the incidents do not meet the criteria for an insanity defense. Nonetheless, he is a significantly disturbed individual whose defect of mental state is pervasive, and was the general cause of his acts."

(J.A. at 3214-15.) Bertschinger also diagnosed Defendant as having a schizotypal personality and stated the following:

> The defendant, Frank Spisak, demonstrates severe defects in his personality structure . . . He has severe conflicts regarding his sexual identity and his sexual impulses are fused and intermingled with aggressive impulses . . . Generally speaking, personality disorders are not considered to be mental disease or mental illness when being used in an insanity defense. However, it is my opinion that Mr. Spisak's personality deficits are of such severity that he can be considered to have a mental illness or mental disease. However, in carefully reviewing his mental state at the time of the alleged crimes, it is my opinion that he knew the wrongfulness of his acts and had the ability to refrain from the acts.

(J.A. at 3217.) Samy's report from the Ohio Department of Mental Health stated in pertinent part that Defendant was sane at the time of all the shootings, and that Defendant "was found to be not mentally ill as defined by the Ohio Revised

Code," although "he has a personality disorder and identity disorder." (J.A. at 3225.) Lastly,[4] Althof concluded that:

> While one could make a case for a chronic psychotic process, his ego dysfunctions are neither so pervasive nor profound, as to warrant such a severe diagnosis . . . A personality disorder diagnosis does not do justice to the severity of the patient's psychological condition and yet his record is not consistent with that of an overt psychotic disorder.

(J.A. at 3239.)

The partial dissent argues that Defendant had some right "to present evidence of his insanity cumulatively." Criminal defendants in Ohio do not have a right to cobble together an insanity defense by selectively relying upon favorable portions of psychiatric expert reports when no single report supports a finding of insanity. Nor do criminal defendants have an incontrovertible right to offer psychiatric testimony in all circumstances where they believe it might conceivably advance their defense. See *State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982) (barring criminal defendants from "offer[ing] expert psychiatric testimony, unrelated to the insanity defense" to negate mens rea); *State v. Taylor*, 781 N.E.2d 72, 84 (Ohio 2002) (upholding a trial court decision to exclude expert testimony which "did not support [the defendant's] insanity defense, since all three experts concluded he was not insane"). Further, criminal defendants certainly do not have a right to present the sort of irrelevant and confusing testimony proffered by the experts in

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[4] Williger's report provides a detailed account of various interviews with Defendant and his family members, but does not evaluate the information to reach independent conclusions about Defendant's mental health.

Defendant's case. As previously discussed, Markey's testimony was riddled with contradictions: his statements on cross examination often directly countered those on direct. The single point of agreement among all of Defendant's other experts was that Defendant had a personality disorder. Finally, even if the trial court had admitted these reports, taken as a *whole*, they still would not have provided support for a "not guilty by reason of insanity defense." With the exception of Markey's internally inconsistent testimony, *none* of Defendant's experts found that "at the time of the criminal act with which he [was] charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act." See *Staten*, 247 N.E.2d at 299.

It was therefore consistent with Defendant's rights for the trial court to exclude this evidence. The Supreme Court has held that, under these circumstances, judges in the position of having to make these decisions must have "wide latitude" to exclude evidence that they think is irrelevant, potentially harmful or confusing to the jury. *Crane*, 467 U.S. at 689-90. While a defendant is entitled to strong latitude in presenting his defense, we are not willing to substitute our judgment for that of the state trial court in this instance, where the record shows that the trial court's decision was not objectively unreasonable, taking into consideration the language of the Supreme Court in *Crane*. Although the partial dissent likens this case to *Chambers* and *Crane*, clear distinctions lie between those cases and Defendant's case. In *Chambers*, the trial court applied state evidentiary rules to prevent the defendant from adversely examining his witness, a third party who previously confessed to the crime charged against the defendant, and also excluded as hearsay the testimony of three witnesses that the third party confessed to the crime. *Chambers*, 410 U.S. at 291-92. The testimony excluded in *Chambers* was mutually reinforcing, and wholly exculpatory if credited by the jury. In Defendant's case, the

psychiatric testimony and reports were contradictory – sometimes even internally inconsistent, as with Markey's stricken testimony at trial. Additionally, even if the jury credited these inconsistent reports, they did not necessarily exculpate Defendant. Finally, while the evidentiary rulings in Chambers were destructive of the trial court's truth-finding purpose, see *id.* at 297 n.8 ("The 'voucher' rule has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process."), the trial court's rulings here were consistent with the goal of truth-seeking since Defendant's contradictory and inconsistent expert testimony would only engender confusion and speculation.

In *Crane*, the Supreme Court found that a "meaningful opportunity to present a complete defense" included the right to present "competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." 476 U.S. at 690 (internal citations omitted). There, the defendant confessed to the crime charged under coercive circumstances and, pursuant to a pretrial ruling on a motion to suppress, the court excluded all testimony at trial bearing on the circumstances of that confession. *Id.* at 690. Unlike the "potentially exculpatory" and "indispensable" evidence in Crane, the expert testimony in Defendant's case merely established mental problems and not insanity. Thus, it cannot be said that such testimony rose to the level of "indispensable" or "potentially exculpatory." Without question, as the partial dissent asserts, Defendant's experts were "competent" and "reliable" in their field. Indeed, these experts so reliably discharged their function that they did not bend their findings or shade their words to find insanity where it did not exist. Their testimony, however reliable their reputations, could not be taken to establish Defendant's legal insanity under Ohio law. Far from "mechanistically appl[ying] the evidentiary relevancy standard" here – a result strongly disfavored where a defendant's right to present a

defense is involved – the trial court gave Defendant's expert every opportunity to meet the court's evidentiary requirements. The trial judge allowed Defendant's expert to testify before the jury notwithstanding his persistent tendency to contradict himself during voir dire, entertained his internally inconsistent testimony before the jury, dismissed the jury for a sidebar during which the judge himself questioned Markey to clarify the expert's position, recalled the jury and allowed Markey to continue testifying, and ultimately entertained the arguments of both the prosecution and defense on the relevance of Markey's testimony. This cannot be offhandedly equated with the type of "mechanistic" application of evidentiary rules or "blanket exclusion" of evidence that so clearly deprives a criminal defendant of his right to present a defense.

The evidence in the record simply does not support a conclusion that Defendant's fundamental right to a fair trial has been infringed by the exclusion of the expert evidence, where the experts did not diagnose Defendant as being insane within the legal definition under Ohio law. It was conceivably within the discretion of the trial court to have admitted this evidence, and perhaps, were we in the position of the trial judge, we might have permitted Defendant to present the testimony of his experts. Under the AEDPA standard, however, we cannot overturn the discretionary evidentiary rulings of a state trial court in the absence of evidence that the trial court acted in a manner that was contrary to, or a violation of, clearly established federal law.

The partial dissent draws support for the opposite conclusion from *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985). Respectfully, such reliance is misplaced. As the partial dissent correctly observes, *Ake* held that "due process requires that indigent defendants be afforded the assistance of a psychiatrist in preparing a defense." In this case, Defendant benefitted from the assistance of not one, but seven experts in

his attempt to demonstrate insanity. Those experts evaluated Defendant, diagnosed him, and prepared reports detailing their diagnoses. Not one of those seven experts could testify honestly and unequivocally that Defendant met Ohio's legal definition of insanity. Nor could their conclusions "cumulatively" justify that result. The *holding* in *Ake* does not require a trial court to permit such irrelevant testimony.

B. Refusal To Instruct The Jury As To The Insanity Defense

Defendant also charges that the trial court improperly refused to instruct the jury on the insanity defense. We disagree. The "not guilty by reason of insanity" defense is an affirmative defense under Ohio law, and the defendant has the burden of going forward with the evidence of an affirmative defense.[5] Ohio Rev. Code 2901.05(A); see also *State v. Humphries*, 364 N.E.2d 1354, 1356 (Ohio 1977); *State v. Chase*, 378 N.E. 1064, 1068 (Ohio 1978) ("Under the statute, a defendant who pleads not guilty by reason of insanity has the burden of going forward with evidence of a nature and quality sufficient to raise the defense before the jury."); *State v. Robbins*, 388 N.E.2d 755, 758 (Ohio 1979) ("The proper standard for determining in a criminal case whether a defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue.").

Even though the burden of going forward is on the defendant, "[w]hen from the evidence reasonable minds may

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[5] Ohio Rev. Code 2901.05(a) provides: "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."

reach different conclusions upon the question of insanity, such question of fact is for the jury." *State v. Reynolds*, 550 N.E.2d 490, 495 (Ohio Ct. App. 1988); *State v. Filiaggi*, 714 N.E.2d 867, 889 (Ohio 1999) (quoting *State v. Thomas*, 434 N.E.2d 1356, syllabus (Ohio 1982)) ("The weight to be given the evidence and the credibility of the witnesses concerning the establishment of the defense of insanity in a criminal proceeding are primarily for the trier of the facts.") "If however, after giving the evidence the most favorable interpretation in favor of the defendant, reasonable minds can come to but one conclusion and that conclusion is adverse to the defendant, it is the trial court's duty to rule on the issue as a matter of law." *Id.* (citations omitted) (holding that there was enough evidence to permit a reasonable jury to find that Reynolds was legally insane at the time the crime was committed; therefore, it was error for the trial court to withdraw the insanity defense from the jury and refuse to instruct the jury concerning the insanity defense).

We have already discussed what we believe to be the insufficiency of Defendant's proffered expert testimony and evidence for establishing an insanity defense. In addition to proffering the reports of the mental health experts, Defendant also called his sister and ex-wife to testify as to his mental state. Defendant's sister, Nadine, testified that Defendant once told her about an incident in which he killed somebody and that he seemed to take delight in the killing. "I thought he was crazy. He had that wild look in his eyes." (J.A. at 2131.) She also testified that she had often told Defendant that "he was crazy" and that there was "something wrong with [him]." (J.A. at 2131.) Nadine further testified about Defendant's involvement with Nazi groups and teachings, and said that she thought Defendant was insane for being a Nazi. She described incidents in which Defendant would dress in a Nazi uniform, but at other times wear the Star of David while listening to Hitler tapes. She also spoke about Defendant's cross-dressing. Nadine told the court that she

thought that there was something dominating or possessing Defendant.

Defendant's ex-wife, Laverne Spisak, also testified about Defendant's listening to Hitler records, and his cross-dressing. (J.A. at 2174-76.) Laverne testified that Defendant started crossdressing after a car accident in 1976 that "messed his mind up . . . he was a little sick . . . it affected his mind very bad." (J.A. at 2176-77.) She said that she told him that he was "sick in the head" and needed help. (J.A. at 2178.) Laverne described one incident in which Defendant brought home a man dressed as a woman, and went to bed with the man, leaving her on the couch. Laverne testified that she left Defendant at that point because she thought he was "sick in the head," but later tried to reconcile a couple of years later. (J.A. at 2180-82.)

Defendant seeks to rely upon the decision from the Ohio Second District Court of Appeals, *State v. Reynolds*, 550 N.E.2d 490 (Ohio Ct. App. 1988), where the court ruled that lay witness testimony could establish an insanity defense. In *Reynolds*, the trial court refused to instruct the jury on the insanity defense because the expert had concluded that defendant Reynolds was "psychologically troubled but not insane." *Id.* at 495. The Second District Court of Appeals reversed on the ground that Defendant had provided competent lay witness testimony from his sister, that went to the issue of Defendant's sanity. *Id.* at 496. ("Where the jury has competent testimony from lay witnesses that would permit the jury to conclude that a defendant's reason was so impaired by disease or other defect of the mind at the time of the criminal act that he either did not know that such act was wrong, or did not have the ability to refrain from doing that act, a jury is permitted to so find.").

The Court found that the testimony provided by Reynold's sister was enough to create a jury question on the issue of insanity where the sister testified "concerning

Reynolds' extensive history of hospitalization for mental illness, and his use of antipsychotic drugs." Id at 494. The sister provided information about Reynolds' erratic behavior when he is off his medication, and further testified that to her knowledge, Reynolds was not on his medication at the time of the assault that was the subject of the trial. Id. The court found that this testimony was enough "from which a reasonable juror might conclude that Reynolds' reason was so impaired at the time of the criminal act that he either did not know that such act was wrong, or did not have the ability to refrain from doing the act." *Id.* at 495.

In contrast to the lay witness testimony provided by the sister in Reynolds, the testimony of the lay witnesses in the present case was not of a nature or quality sufficient to create a jury question on the issue of Defendant's sanity. Defendant's ex-wife and sister described unusual, perhaps even bizarre behavior that certainly may have been questionable and alarming for Defendant's family, but this type of behavior does not raise a question of legal insanity. Our society is rife with cross-dressers, latent homosexuals, bisexuals and even Hitler-supporting Nazis. While this type of behavior may be considered socially unacceptable by many, it by no means is determinative of legal insanity.

Furthermore, juxtaposed against the testimony from Laverne and Nadine that Defendant was crazy or that "there was something wrong with him," there was also a great deal of evidence and testimony about the fact that Defendant selectively chose his victims and the times he would kill, in an effort to avoid being caught. This evidence suggests that Defendant was not unaware of the wrongfulness of his conduct or unable to refrain from committing the murders. Dr. Resnick testified and read extensive extracts from his report of his interviews with Defendant, and Defendant's account of the various incidents. For instance, after his first encounter with the victim Timothy Sheehan, in which

Defendant attempted to engage Sheehan sexually in the men's room at Cleveland State University, Defendant reported to Resnick that "he left the men's room because he was unsure if Mr. Sheehan might call the police, and spent 45 to 60 minutes in the library nearby." (J.A. at 2278.) Defendant also reported that he shot Reverend Rickerson because Rickerson was in "his stall," he was in a bad mood, and also because Rickerson persisted in making homosexual advances toward him. (J.A. at 2279.) Afterward, Defendant "ran out quickly because he was scared." Defendant admitted to Resnick that "he would not have shot him if others had been in the bathroom for fear of being caught." (J.A. at 2279.)

Defendant told Resnick that he tried to kill Coletta Dartt because he became angry when he heard people making fun of the "White People's Party." He decided to teach her a lesson and intended to "slap the shit out of her and rob her" when she came out of the ladies' room at Cleveland State. (J.A. at 2280.) Defendant also said that robbery was in part the motivation for the shooting of Timothy Sheehan. He said that he needed money and "he thought in his mind that it was not fair that this man had money and he did not" and "[h]e knew that if he did take money from him and let him live, the victim might identify him in the future." (J.A. at 2282.) Defendant then shot Sheehan four times, and afterward, he reported that he searched Sheehan for cash and left "real quick because he did not want to get caught." (J.A. at 2282.) Defendant also reported that the Friday after the shootings in the bathroom, he and a friend went out "looking for black people to shoot," but did not manage to shoot any. (J.A. at 2283.) They tried again the following Sunday, but again abandoned their plan "rather than risk getting caught." (J.A. at 2283-84.) According to Defendant, his friend "was more conservative and discouraged him from shooting unless the situation was safe." (J.A. at 2284.)

Defendant's own testimony at trial also contradicts the idea that he was insane at the time of the killings. When asked why he killed Reverend Rickerson, Defendant responded that he killed Rickerson "because he was bothering me. He was making obscene lewd gestures at me . . . He wasn't leaving me alone." (J.A. at 1447.) Defendant himself testified that after shooting Sheehan, he picked up the brass casings from his gun because the brass is worth money and also because "it's sloppy to leave it laying around." (J.A. at 1602.) Defendant further testified that he shot Hardaway on the other side of town away from Cleveland State, where the other shootings had taken place, because "he didn't want the police to link the two shootings together and link it to [him]," and he "didn't want to get caught." (J.A. at 1791.) After testifying that he shot the victim Brian Warford sitting in the bus shelter eight times in the head because Warford was "one of the enemies," Defendant then said that he felt good about the shooting, but "was just worried about getting back across to the other side of the campus to where I put the car because I figured in the early morning hours it was so quiet somebody was bound to hear all the shots." (J.A. at 1573.) In further efforts to avoid being linked to the murders, Defendant cut off the barrel and rubbed off the serial numbers of the gun he used. (J.A. at 1767.) After police discovered that Defendant was the shooter, they found Defendant hiding out in the cellar of a friend's basement until he could leave town to avoid capture. (J.A. at 1801.)

On the balance of the evidence presented at trial, we conclude that the trial court did not err in refusing to instruct the jury on the insanity defense. Defendant did not present sufficient evidence to make it an issue for the jury. The experts all concluded that Defendant was sane and knew the wrongfulness of his conduct. The evidence of decisions that were made by Defendant to not act at certain times or to take measures to avoid getting caught weigh heavily against a finding that Defendant was legally insane. Also, the mere

fact that Defendant was engaged in Nazi activities and considered himself to be part of a race war does not create an inference that he was legally insane. Defendant testified that he wanted to "get as many [black people] as I could before I got caught, one thousand, a million, the more the better." (J.A. at 1449.) Defendant said he armed himself "for the race war." (J.A. at 1451.) Again, while these views are anti-social and probably evidence of a serious personality disorder, we are not prepared to hold that Neo-Nazi racist and anti-Semitic views establish a lack of guilt by reason of insanity, where the evidence clearly suggests that Defendant did not have a mental disease or defect, and knew the wrongfulness of his conduct.

II. Ineffective Assistance of Counsel During Mitigation Phase

The Supreme Court first articulated the now familiar two-part test for determining whether counsel is ineffective in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant seeking to establish that his counsel's assistance was ineffective must show: (1) that his counsel's performance was deficient, in other words, that it "fell below an objective standard of reasonableness;" and (2) that the defense was prejudiced by the attorney's deficient performance. *Strickland*, 466 U.S. at 687-88. Although trial counsel's performance here is subject to de novo review, the reviewing Court's scrutiny of counsel's performance is highly deferential, and counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996) (overruled on other grounds). The reviewing Court must "evaluate the reasonableness of counsel's performance within the context of the circumstances at the time of the alleged errors." *Id.* (citations omitted). "Trial counsel's tactical decisions are particularly difficult to attack, and a

defendant's challenge to such decisions must overcome a presumption that the challenged action might be considered sound trial strategy." *Id.* (internal citations and quotations omitted).

In order to establish deficiency under *Strickland*, Defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed [Defendant] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To satisfy the prejudice prong of the *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The inquiry, when a defendant challenges a conviction, is whether "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; see also *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (Defendant demonstrates prejudice if he can show that there is a reasonable probability that "at least one juror would have struck a different balance").

The Strickland Court explained that while strategic choices made after a thorough investigation

> are virtually unchallengeable . . . strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary.

Id. at 690-91. Thus it follows that any decision to forego mitigation evidence is unreasonable if not made after a reasonable decision to cease further investigation. *See id.*

A. Hostile Remarks During The Closing Argument Of The Mitigation Phase

Defendant first argues that his counsel rendered ineffective assistance during his closing argument at sentencing by repeatedly stressing the brutality of the crimes and demeaning Defendant. We agree. The transcript reveals that in the early part of the closing, trial counsel did focus rather heavily on what he called the aggravating circumstances and the heinousness of the crimes. Defendant's trial counsel addressed the jury, telling them that "so little really needs to be said about the degree of aggravating factors, clearly horrendous," and pointed out that no one involved in the trial was ever going to forget it or Defendant. (J.A. at 3061.) Trial counsel went on to make the following disturbing remarks:

> [E]veryone of us who went through this trial, we know we can feel that cold day . . . or see that cold marble, and will forever . . . see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is . . . the reality of what happened there . . . you can smell almost the blood. You can smell, if you will, the urine. You are in a bathroom, and it is death, and you can smell the death . . . and you can feel, the loneliness of that railroad platform . . . And we can all appreciate, and you can understand, and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses and looked into the muzzle of a gun that kept spitting out bullets . . . And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children . . . you and I and everyone one of us, we were

> sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never [sic] what hit him, and we can feel that bullet hitting, and that's an aggravating circumstance . . . There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky.

(*Id.* at 3062-65.) The district court concluded that this extremely graphic and overly descriptive recounting of Defendant's crimes were an appropriate part of trial counsel's strategy to confront the heinousness of the murders before the prosecution had the opportunity to do so. The district court reasoned that once counsel identified with their emotions towards Defendant, he could then explain to them that their feelings were misplaced because Defendant was mentally ill. Had Defendant's trial counsel actually done the latter, and spent a substantial amount of the time humanizing and rehabilitating Defendant in the eyes of the jury by arguing that Defendant was misguided or mentally ill and deserved to have his life spared, then the district court might be correct that this was permissible trial strategy. The record reveals, however, that trial counsel did very little to offset the negative feelings that his own hostility and disgust for Defendant may have evoked in the jury. Instead, as Defendant argues, trial counsel further denigrated Defendant and even went so far as to tell the jury that Defendant was undeserving of mitigation.

Trial counsel's efforts at presenting mitigating evidence consisted of telling the jury about what he described as Defendant's "sick twisted mind" and his association with the Third Reich and the Nazis, and what counsel perceived it was like to be inside Defendant's mind, based on Defendant's testimony about the murders. While trial counsel

did then try to stress that Defendant was mentally ill, even if not legally insane, trial counsel proceeded to undermine this limited effort by making the following inexplicable remarks:

> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none. He is sick, he is twisted. He is demented, and he is never going to be any different.

(J.A. at 3069.) Trial counsel's performance did not improve after this, but rather counsel continued to do further harm to Defendant by rambling incoherently towards the end of the closing statement about integrity in the legal system. Trial counsel's final moments were not devoted to a discussion of the reasons why Defendant's mental illness made him deserving of mitigation, but rather to discussing all the other participants in the trial. Namely, trial counsel discussed the jurors, lawyers, the judge, policemen, and the victims' families, and focused on the importance of the jury's decision to all of these various individuals, instead of arguing how and why the mitigating factors outweighed the aggravating factors. Most shocking of all, however, trial counsel suggested to the jury that either outcome, death or life, would be a valid conclusion, by stating to the jury that "whatever you do, we are going to be proud of you." (J.A. 3101.)

We find persuasive Defendant's argument that in pursuing this course, trial counsel abandoned the duty of loyalty owed to Defendant, as was the case in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). In *Rickman*, counsel pursued a similar strategy of attempting to portray his client as a "sick" and "twisted" individual which should mitigate

the death sentence. Trial counsel's strategy in *Rickman* involved repeated attacks on his client's character, eliciting damaging character evidence about his client, making disparaging comments to any witness who spoke favorably about his client, and apologizing to the prosecutors for his client's crime. *Id.* at 1157. This court concluded that counsel's performance was "outrageous" because his attacks on Rickman equaled or exceeded those of the prosecution. *Id.* The court found that the defendant was effectively deprived of assistance of counsel in light of the severity of counsel's conduct. *Id.* at 1160.

We believe that trial counsel's actions discussed above are so egregious that they are equivalent to those in *Rickman*, and similarly deprived Defendant of effective assistance of counsel, in violation of the Sixth Amendment. Here, as in *Rickman*, trial counsel's hostility toward Defendant aligned counsel with the prosecution against his own client. Much of Defendant's counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim. As was the case in *Rickman*, "[th]e effect [counsel] created was not one of pity for a pathetic [Defendant], but one of hostility toward the hated and violent freak." *Id.* at 1160. In light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has rebutted the "strong presumption" that counsel's actions constituted "sound trial strategy." *Strickland*, 466 U.S. at 689. Defendant is correct that "there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming qualities, will never be rehabilitated, has never done a good deed, is not deserving of no (sic) sympathy, and is entitled to no mitigation." (Def.'s Br. at 64.) Absent trial counsel's behavior during the closing argument of the mitigation phase of the trial, we find that a reasonable probability exists that at

least one juror would have reached a different conclusion about the appropriateness of death, and may have voted for life instead. Therefore, we reverse the district court's denial of habeas on this claim.

B. Failure To Adequately Investigate Defendant's Background

We find unpersuasive, however, Defendant's claim that trial counsel should have presented more evidence to the jury during the mitigation phase of the trial. The Supreme Court has now applied *Strickland* in the AEDPA context at least three times to hold that a defense attorney's failure to adequately investigate and present mitigating evidence at the sentencing phase of a death penalty trial constitutes ineffective assistance of counsel. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005); *Wiggins*, 539 U.S. at 537-38; *Williams*, 529 U.S. at 390. In those cases, the Court cautioned that trial counsel has an "obligation to conduct a thorough investigation of the defendant's background" in death penalty cases. *Wiggins*, 539 U.S. at 522 (citing ABA guidelines advising attorneys to conduct through investigations); *Williams*, 529 U.S. at 396. In this context, the Supreme Court has warned against a tendency to invoke "strategy" as a "*post-hoc* rationalization of counsel's conduct [rather] than an accurate description of their deliberations prior to sentencing" to explain counsel's decisions. *Id.* at 527.

This Court has to first determine whether counsel conducted a reasonable investigation of Defendant's background. Prior to trial, an extensive social history was obtained on Defendant, based on interviews with Defendant, his father, mother, and two sisters as well as various medical records. The report contained information about the family dynamics, including the fact that Defendant's father was emotionally distant and that his mother was a strict disciplinarian. Defendant argues that this information should have led to further investigation into his background, and that

trial counsel should have presented various childhood experiences as mitigating evidence. However, the only relevant background that Defendant argues should have been put forth is the fact that he had an extremely strict mother who humiliated and hit him when he displayed sexual behavior, and who also taught him to hate people of color and others whom she deemed to be "undesirable" or "repulsive." (Def.'s Br. at 68-72.) Defendant argues that this information would have helped the jury understand his troubled history and would have provided some explanation for his behavior.

Despite Defendant's claim that more information should have been presented, the record shows that the various mental health experts retained by defense counsel to establish an insanity defense all testified and talked about Defendant's childhood, and the fact that it was marked by social isolation and a lack of ability to form inter-group relationships. The experts also discussed Defendant's gender confusion, and how that was tied to violent tendencies and the urge to kill.

During Dr. Bertschinger's testimony, counsel inquired into, and Bertschinger discussed, Defendant's pursuit of a sex change operation. In light of the evidence that was presented, we do not agree that trial counsel was ineffective in failing to properly investigate Defendant's background. Moreover, even if there should have been more investigation, Defendant must demonstrate that he suffered prejudice as a result of counsel's omission, and that at least one juror would have reached a different result had this additional evidence been presented. *See Wiggins*, 539 U.S. at 536; *Hamblin v. Mitchell*, 354 F.3d 482, 493 (6th Cir. 2003). Defendant has not shown that a reasonable probability exists that one juror would have reached a different conclusion given additional evidence. The best chance of mitigation available was in fact the evidence that Defendant was, to some degree, mentally ill. If the extensive evidence of

Defendant's severe personality disorder, flirtation with the idea of having a sex change, sexual confusion, and social isolation was not enough to sway jurors, then we do not believe that evidence that Defendant's mother was a strict disciplinarian would have changed the mind of at least one juror.

Furthermore, this additional evidence does not rise to the level that this court generally has required to demonstrate prejudice. See *Hamblin*, 354 F.3d at 490-91 (where counsel failed to discover evidence of extreme poverty, neglect, violence, and instability, as well as a mental disorder); *Coleman v. Mitchell*, 268 F.3d 417, 450-51 (6th Cir. 2001) (where counsel did not discover defendant's history of abandonment, physical and psychological abuse, and pedophilia, as well as personality disorder and probable psychosis); *Greer v. Mitchell*, 264 F.3d 663, 678 (6th Cir. 2001) (counsel did not follow-up on knowledge of family history which included violence, foster care, incarceration, and alcoholism); *Carter v. Bell*, 218 F.3d 581, 596-97 (6th Cir. 2000) (counsel did not investigate childhood history of violence and instability). Defendant's only additional evidence is that his mother was a strict disciplinarian, his father was often absent, that his mother would hit him for expressing sexual behavior, and that his mother taught him to distrust black people. Taken together, this is not enough to establish prejudice. Indeed, Defendant's childhood appears to have been relatively stable, with no poverty, and an absence of physical abuse, other than corporal punishment.

We should also note that we find unpersuasive Defendant's argument that it was unreasonable for trial counsel to utilize the same experts who were retained to testify as to Defendant's sanity. This argument has no merit where the record establishes that these experts did in fact testify during mitigation about the effects that Defendant's childhood, sexual confusion, racism, and "personality

disorders" may have had on his behavior. There was no need for counsel to retain a new battery of experts to essentially reproduce what had been done by doctors Markey, McPherson, and Bertschinger.

Lastly, we do not believe that it was unreasonable for trial counsel to push to have the mitigation phase of the trial begin the day after the jury rendered the verdict. Several of the experts were leaving town, and trial counsel decided not to seek a continuance. While Defendant argues that this expeditious push to mitigation meant that trial counsel had not had time to prepare the strongest possible mitigation case, we have no way to determine from the record below how or when trial counsel prepared for mitigation. As far as we know, trial counsel may have had, and certainly should have had, a team working on mitigation for weeks beforehand, thereby making it unnecessary to seek a continuance. We are not in a position to say that trial counsel's failure to seek a continuance constituted a deficiency that caused Defendant prejudice.

In conclusion, we grant Defendant habeas relief on his ineffective assistance of counsel claim on the basis of counsel's hostile and inept statements and lack of advocacy during the closing argument of the mitigation phase of the trial.

III. Acquittal First Jury Instruction

Defendant next claims that the trial court unconstitutionally instructed the jury that its sentencing decision had to be unanimous and gave an improper "acquittal-first" jury instruction. The district court concluded, and we agree, that Defendant's argument has merit under this Court's prior holding in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). In *Davis*, this Court granted habeas relief to a death sentenced defendant because it determined that the acquittal-first jury instruction, combined with a verdict form that required the signature of all twelve jurors, likely led the

jurors to conclude that mitigation factors also had to be found by all twelve jurors, thereby precluding an individual juror from giving effect to mitigation evidence not found by the others. *Id.* at 689.

While a trial court's sentencing phase instructions may require juror unanimity as to the results of the process of weighing aggravating circumstances and mitigating factors, the instructions cannot require unanimity as to the presence of a mitigating factor. *Mills v. Maryland*, 486 U.S. 367 (1988); *see also Roe v. Baker*, 316 F.3d 557, 563-64 (6th Cir. 2002); *Williams v. Coyle*, 260 F.3d 684, 702 (6th Cir. 2001); *Coe v. Bell*, 161 F.3d 320, 337-39 (6th Cir. 1998). Further, an "acquittal-first" instruction, which requires the jury to unanimously reject a death sentence before considering other sentencing alternatives, is unconstitutional. *Mapes v. Coyle*, 171 F.3d 408, 416-17 (6th Cir. 1999). In *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990), the Supreme Court ruled unconstitutional any requirement that "prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find." Under *McKoy*, each juror must be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. *Id.* at 443; *Mills*, 486 U.S. at 374-75. Aggravating factors must be found unanimously because they are the elements of the murder offense that make the defendant death eligible. *Davis*, 318 F.3d at 687. "Mitigating factors, on the other hand, are not viewed as elements of the crime but rather as evidence relevant to a defendant's character or record or other circumstances of the offense that might lead a sentencer to decline to impose the death sentence." *Id.* at 688. Therefore, a state may not require unanimity in finding mitigating factors because such a requirement "impermissibly limits jurors' consideration of mitigating evidence." *Id.* (citing *McKoy*, 494 U.S. at 444). "In fact, as *Mills* and *McKoy* hold, any requirement that mitigating

factors must be found unanimously is incoherent." Id. In other words, "in order for Eighth Amendment law on mitigating factors to be coherent and capable of judicial administration without serious confusion, a capital jury must understand that . . . a finding with respect to a mitigating factor may be made by one or more members of the jury." *Id.* (internal citations and quotations omitted).

In light of the case law discussed above, this Court's inquiry in the present case is, "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Id.* (quoting *Jones v. United States*, 527 U.S. 373, 390 (1999); *Boyde v. California*, 494 U.S. 370, 380 (1990)). We think that the answer is "yes." During the mitigation phase, the trial court read the following instructions to the jury:

> [T]he procedure which you must follow in arriving at your verdict in this sentencing hearing is set forth in Section 2929.03 of the Revised Code of the State of Ohio . . . you must determine whether, beyond a reasonable doubt, the aggravating circumstances, which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case. If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, then you must return that finding to the Court. I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr.

> A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court . . . .

(J.A. at 3146-47.) These instructions are virtually identical to those given in *Davis*, which this Court determined are "acquittal-first" jury instructions that failed to instruct the jury "that it need not be unanimous in rejecting the death penalty." *Davis*, 318 F.3d at 689. The *Davis* Court found that not only did these instructions reflect a unanimity requirement, but the verdict form itself also reflected one, in that it had a spot for all twelve signatures under a statement professing that the jury found beyond a reasonable doubt that the aggravating factors did not outweigh the mitigating factors. *Davis*, 318 F.3d at 689.

Similarly, in the present case, the verdict form also reflected a unanimity requirement for a finding that the mitigating factors outweighed the aggravating factors. The trial court told the jury that in order to impose a sentence of death, all twelve had to sign under the statement on the verdict form stating that "we the jury, in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that

the aggravating circumstance . . . was sufficient to outweigh the mitigating factors . . . we the jury recommend that the sentence of death be imposed . . . ." (J.A. at 3149.) The trial court further explained the method for using the verdict forms in the following manner:

> There are four separate jury forms for counts five, six and . . . eight. Now, there is also a set of verdict forms, same count numbers, read [sic] as follows:
>
> 'We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not sufficient to outweigh the mitigating factors present in this case.
>
> We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parol eligibility after serving' – there is an asterisk for a spot on the verdict form for you to fill in either 20 or 30 years of imprisonment. And again, all twelve of you must sign whatever verdict it is you arrive at [sic] must be signed in ink.

(J.A. at 3149.) The instructions as to how to acquit for death and impose a life sentence did not differ at all from the instructions as to how to impose death. In explaining the forms, the trial court indicated that all twelve signatures were required to impose a sentence of death, and to acquit for death and impose a life sentence. As we stated in *Davis*, this instruction,

> combined with the jury verdict form, not only 'could' but by its plain language 'would' lead a reasonable juror to conclude that the only way to get a life verdict is if the jury

> unanimously finds that the aggravating circumstances do not outweigh the mitigating circumstances, an entirely different instruction from one that clearly informs the jurors that a life verdict can be rendered by a jury that has not first unanimously rejected the death penalty. Further adding to the confusion, the jury was never told, either expressly or impliedly, that individual jurors may consider mitigating factors in the weighing process regardless of the lack of agreement with other jurors as to the presence of that factor.

Davis, 318 F.3d at 689-90.

In conclusion, we find that the silence on the lack of unanimity required to find mitigating circumstances, the improper "acquittal-first" jury instruction, and the misleading verdict form and instruction as to how to use the verdict form, would have led a jury to apply an unconstitutional unanimity standard at all stages of the deliberative process. See *id.* at 690.

IV. Clemons Violation

Defendant next argues that the trial court improperly instructed the jury on multiple aggravating circumstances for each aggravated murder charge. While we agree with Defendant that the jury was improperly instructed, the error was later remedied by the Ohio Supreme Court.

In *Clemons v. Mississippi*, 494 U.S. 738, 741 (1990), the Supreme Court held that the "[f]ederal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review." According to the Court,

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more remaining aggravating factors outweigh the mitigating evidence.

Id. at 745. "We see no reason to believe that careful appellate weighing of aggravating . . . circumstances in cases such as this would not produce 'measured consistent application' of the death penalty or in any way be unfair to the defendant." *Id.* at 748. During the reweighing process, the state appellate court may not automatically affirm the defendant's death sentence. *Id.* at 752. Rather, the court must give the defendant "an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Id.* at 749. Recently, in *Brown v. Sanders*, 126 S.Ct. 884, 892 (2006), the Supreme Court announced the new rule that:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

The Court's concern in *Brown* was "the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have been weighed in favor of the death penalty," but "such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts

and circumstances under the rubric of some other, valid sentencing factor." *Id.* (emphasis in original).

Defendant was indicted on four separate counts of aggravated murder, with a total of nineteen specifications. On appeal, the Eighth District Court of Appeals determined that Defendant was improperly convicted of two counts of aggravated murder for the death of Timothy Sheehan, stating that:

> The appellant was indicted on four counts of aggravated murder for the murders of three people. Two counts of aggravated murder, the fifth and sixth counts of the indictment, were for the murder of one individual, Timothy Sheehan. The appellant was subsequently convicted for and sentenced on all four counts of aggravated murder . . . Accordingly while it was proper for the appellant to have been indicted on two separate counts of aggravated murder for the murder of Timothy Sheehan he could only be convicted on one of those counts.

Spisak, 1984 WL 13992, at *7. The Eighth District Court of Appeals thus vacated Defendant's conviction on the fifth count of aggravated murder, relating to Sheehan's death, as well as the specifications attached thereto. *Id.* The court of appeals then reweighed the aggravating and mitigating circumstances as they related to the remaining counts and specifications, and upheld the convictions and sentences on those counts. *Id.* at *8. Subsequently, the Ohio Supreme Court noted that the trial court had also failed to merge certain specifications, and held the following:

> Proceeding to our independent weighing of the aggravating circumstances and mitigating factors presented herein, we note that appellant's three aggravated murder

> convictions specify fifteen separate aggravating circumstances under R.C. 2929.04. However, as pointed out by appellant in his first proposition of law, for purposes of sentencing the doctrine of merger herein applies. Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct. Although the court of appeals did not apply the merger doctrine below, we have determined that the jury's consideration of the duplicative aggravating circumstances during sentencing did not affect their verdict. Furthermore, we have independently determined that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Spisak, 521 N.E.2d at 803.

After reviewing the state court proceedings, the district court held, and we agree, that the Ohio Supreme Court did not unreasonably apply federal law in independently reweighing the aggravating and mitigating factors, and upholding Defendant's convictions and sentence. While it is undisputed that the trial court committed error in not merging the death penalty specifications, the Ohio

Supreme Court's independent reweighing was sufficient to remedy any error.

It is also clear that after merging the duplicative aggravating circumstances, the Ohio Supreme Court gave the required individualized sentencing determination, *see Clemons*, 494 U.S. at 749, in reweighing Defendant's death sentence:

> Of the mitigating factors specified in R.C. 2929.04(b) appellant relied solely on his allegations that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offense. Although there was testimony that appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.
>
> Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offense. Nothing in the nature and circumstances of these deliberate murders tempers the gravity of the offenses. We concur with the jury and lower courts that the balance

> of these factors lies heavily, and beyond reasonable doubts, on the side of the aggravating circumstances of which the appellant was convicted.

State v. Spisak, 521 N.E.2d at 803-04 (internal citations omitted). Unlike the case in *Clemons*, this Court can clearly discern that the Ohio Supreme Court did in fact employ the proper method of reweighing the aggravating and mitigating factors before upholding the death sentence. *Clemons*, 494 U.S. at 741.

Moreover, under the recently-decided *Brown* decision, which states that the sentence is unconstitutional unless the jury could give aggravating weight to the same facts and circumstances under one of the other sentencing factors, the reweighing was still sufficient to cure the error where the Ohio Supreme Court merely invalidated some of the specifications because they were duplicative of other specifications that were also considered by the jury. *Brown*, 126 S.Ct. at 892. The jury was able to give aggravating weight to the same facts and circumstances in the remaining murder convictions and death penalty specifications that were properly submitted to the jury.

We thus find that any error related the weighing of aggravating and mitigating factors during the sentencing phase of Defendant's trial was cured by the Ohio Supreme Court's reweighing of the factors, and therefore the Ohio Supreme Court did not violate clearly established federal law in upholding Defendant's death sentence.

V. Prosecutorial Misconduct

We lastly turn to Defendant's prosecutorial misconduct claim. "In deciding whether prosecutorial misconduct mandates that habeas relief be granted, the Court must apply the harmless error standard." *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002) (quoting

Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997)). The relevant question is whether the prosecutor's remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Post-AEDPA, this Court has adopted a two-step test to determine whether prosecutorial misconduct violates a Defendant's due process rights. First, we consider whether the prosecutor's remarks were improper. *Id.* at 452. If we determine that the remarks were improper, then we must "apply the four-factor test set forth in *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994), to determine 'whether the impropriety was flagrant' and thus violated the defendant's due process rights." *Id.* (quoting *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)). The four factors to consider are: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; (4) whether the evidence against the defendant was strong." *Id.*

We must first consider Defendant's allegations of prosecutorial misconduct and determine whether the statements were improper before proceeding to an analysis under the four factors. The district court found that while some of the prosecutor's remarks may have been "repugnant, they did not deny Spisak due process or inject any fundamental unfairness into the trial." (J.A. at 238.) Overall, we agree.

A. Beverly Murphy as a Rebuttal Witness

First of all, we do not believe that it was improper for the prosecution to call Murphy as a rebuttal witness, but even if it was, none of the testimony elicited from Murphy was at all prejudicial to Defendant. The prosecution called Murphy, over the objection of the defense, to rebut the testimony of Dr. Bertschinger. The district court ruled that Murphy's

testimony did not rebut Bertschinger's testimony and that the "trial court erred when it permitted Murphy to testify," but that Defendant was not prejudiced by anything that Murphy said. (J.A. at 236.) We disagree with the district court's conclusion that Murphy's testimony did not constitute rebuttal testimony.

The trial court allowed Murphy to be called as a rebuttal witness over the defense's objection because the prosecution had asked Bertschinger questions about the relationship that Defendant, a self-professed Nazi supporter and white supremacist, claims to have had with Murphy, an African-American prostitute. Bertschinger opined that Defendant had a romantic relationship with Murphy, which reflected his personality disorder, given his alleged hatred of African-Americans. In response, the prosecution called Murphy who contradicted this characterization of her relationship with Defendant, testifying that the relationship was nothing more than a business relationship. Murphy testified extensively about the frequency and manner in which Defendant compensated her for sexual services, which included giving her guns. This testimony was appropriate to rebut Bertschinger's contention that Defendant had a romantic relationship with Murphy.

Regardless, however, of whether the testimony was in fact rebuttal, we agree with the district court that even if the testimony was inappropriate, it was not, under the first of the four *Carter* factors, prejudicial to Defendant. Murphy did not reveal anything new that the jury had not heard before, and her testimony was not inflammatory or damaging to Defendant. She merely recounted facts that the jury had already heard, and offered her perspective that she and Defendant's relationship was nothing more than a business arrangement. Further, much of the testimony that Defendant challenges, was actually given in response to defense counsel's questioning on cross-examination. We therefore

conclude that Murphy's testimony did not render Defendant's trial fundamentally unfair.

B. Improper Remarks During The Mitigation Phase

Defendant next claims that the prosecutor made improper comments during its cross-examination of Bertschinger during the mitigation phase of the trial. Again, we find this claim to be without merit. First Defendant argues that the prosecutor improperly described him as a whore, but the record reveals that while the prosecutor did refer to Defendant's homosexual prostitution, he did not use the term whore. Moreover, these remarks were in reference to Bertschinger's testimony that Defendant admitted engaging in homosexual prostitution, and that these activities contributed to the dissolution of Defendant's marriage. These comments were therefore not improper.

It was also not improper for the prosecution to make reference to Dr. Markey's stricken testimony where defense counsel "opened the door" to this questioning by addressing Markey's report on direct examination. Defendant also claims that the prosecution improperly stated that Defendant "wanted to be a pimp," but the record reveals that the question was posed to Bertschinger as part of a discussion of Defendant's tendency to date black prostitutes and have them live in his home. Again, we do not believe that the remark was improper since it was only a passing reference and was posed as a legitimate question; but even if it was improper, we still find that any potential prejudice would have been minimal and would not have impacted the fundamental fairness of the trial.

We also do not believe that Defendant was prejudiced by any of the prosecutor's remarks during the prosecution's closing arguments of the mitigation phase of the trial. The prosecutor's argument was devoted to demonstrating that Defendant's personality disorder did not outweigh his

culpability for the murders he had committed, and that Defendant's actions were voluntary and he knew what he was doing when he committed the crimes. Out of thirty-three pages of argument, Defendant points to a few isolated comments to try to establish that his due process rights were violated. Defendant points out that the prosecution accused him of fabricating testimony; of being unwilling to support his wife; characterized Defendant as having no remorse; characterized the expert testimony as insulting and being mumbo jumbo; likened Defendant to a rat who hides in the basement; commented that Defendant would not have pled not guilty by reason of insanity if two of the witnesses had not survived; and asked the jury "how many people does he have to kill before we say enough is enough." None of these minimal, isolated remarks, even if improper, prejudiced Defendant or rendered his trial fundamentally unfair.

C. Cross-Examination of Defendant

Lastly, Defendant argues that the prosecution committed misconduct during his cross-examination by questioning Defendant about his bizarre political and religious beliefs, his receipt of public assistance, his failure to support his family, his homosexuality, his activities as a male prostitute, and treatment of his wife. Again, we find this argument to be without merit where the record reveals that the majority of these issues were in fact raised by Defendant's trial counsel during direct examination. Trial counsel's direct examination of Defendant focused on Defendant's political and religious beliefs, associations with Nazis, hatred of blacks and Jews, and how those hatreds drove him to the killings. Defendant also testified on direct about his homosexual activity, cross-dressing, and consideration of a sex change operation. Defendant further testified that he could not recall the reasons for his divorce, but that he continued to support his wife and daughter

afterward. As these matters were addressed on direct, they were the proper subject of cross-examination.

We therefore conclude that the district court properly found that there was no prosecutorial misconduct that denied Defendant due process or injected any fundamental unfairness into Defendant's trial.

CONCLUSION

For the foregoing reasons, we **AFFIRM** in part and **REVERSE** in part. We **AFFIRM** the judgment of the district court as it relates to issues I, IV, and V, but we **REVERSE** the district court's judgment as to issues II and III, and **REMAND** with instructions to grant the Writ as to issues II and III. Accordingly, we deny habeas relief with respect to the determination of Defendant's guilt, but remand for a new mitigation phase trial.

CONCURRING IN PART, DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I concur in the majority opinion, except for its treatment of Issue 1, Spisak's insanity defense. I believe that the trial court's exclusion of expert testimony and evidence regarding Spisak's insanity defense and the trial court's refusal to submit the insanity defense to the jury violated Spisak's rights to a fair trial and to present a complete defense, rights long recognized by the Supreme Court. Therefore I would remand this case to the district court with instructions to grant a conditional writ of habeas corpus, giving the State of Ohio 180 days to retry Spisak or release him from custody.

Spisak claims that he was legally insane because of a severe personality disorder (which manifested itself with the bizarre and seemingly inconsistent beliefs and behaviors

including racial and ethnic hatred and sexual deviance) and that he was entitled to present evidence of his insanity cumulatively, rather than needing to produce a singular expert who could testify to both prongs of the Ohio insanity standard.

In order to succeed on his affirmative insanity defense, Spisak needed to "establish by a preponderance of the evidence that disease or other defect of his mind had so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act." *State v. Staten*, 247 N.E.2d 293, 299 (Ohio 1969) (footnote omitted). When insanity is pleaded as a defense, and the evidence is such that "reasonable minds may reach different conclusions upon the question of insanity, such question of fact is for the jury." *State v. Gaines*, 318 N.E.2d 857, 864 (Ohio Ct. App. 1974) (internal quotation marks omitted). "If, however, after giving the evidence the most favorable interpretation in favor of the defendant, reasonable minds can come to but one conclusion and that conclusion [is] adverse to defendant, it is the court's duty to rule on the issue as a matter of law." *Id.* (internal quotation marks omitted).

Spisak argues that "although none of the defense experts were prepared to specifically conclude that Spisak was legally insane, their testimony was being presented as relevant and material to specific elements of the insanity defense, from which the defense thereby hoped to meet the burden of proof supporting an insanity defense."1 Appellant Br. at 20. Spisak is correct that cumulatively, his psychiatric experts did provide support for the necessary insanity elements. In his report on the issue of sanity at the time of the act, Dr. Bertschinger stated that it was his opinion that "Mr. Spisak's personality deficits are of such severity that he can be considered to have a mental illness or mental disease."

J.A. at 3217 (Bertschinger Rep. at 2). Dr. Markey's report and proffered testimony supported Spisak's claim that he was unable to refrain from committing the criminal acts. J.A. at 3192 (Markey Rep. at 3) ("I believe Spisak is in a latent psychosis (grandiose, paranoid, lacking in finer feelings, etc.) and that he was unable to control his impulses to assault, though he was at the time, aware of it's being socially wrong."); J.A. at 2082 ("I would say that [Spisak] was aware [that his actions broke the law], and he was unable to change his actions even though he knew that he was doing something that was against the law."); J.A. at 2083 (agreeing that Spisak's personality disorder was of such gravity that he would not be able to conform his conduct to the requirements of the law). Markey wavered on cross examination on his opinion that Spisak could not control his actions, but then on redirect restated that he believed Spisak was unable to control his impulse to assault. J.A. at 2093-97 (Trial Tr. at 1992-96).

Under the *Gaines* standard above, when giving Spisak's expert evidence the interpretation most favorable to Spisak, I conclude that reasonable minds could reach different conclusions about his sanity. Therefore, the issue of Spisak's insanity should have been submitted to the jury to allow it to consider his insanity defense. *See Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). I also believe that Spisak's argument that the Supreme Court of Ohio's perfunctory dismissal of this claim was an unreasonable application of federal constitutional law has merit. The Supreme Court has recognized the essential nature of expert testimony in presenting an insanity defense, holding that due process requires that indigent defendants be afforded the assistance of a psychiatrist in preparing a defense. *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (stating that "the

testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.'") (footnote omitted). Furthermore, while most violations of state law are not sufficient to justify habeas relief, "[w]hen an evidentiary ruling is so egregious that it results in a denial of fundamental fairness, it may violate due process and thus warrant habeas relief." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Adverse evidentiary rulings by state courts do not harm a defendant's due process rights unless they "offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996) (internal quotation marks omitted). The Supreme Court has repeatedly held, however, that a criminal defendant's right to present a defense, including presenting witnesses on his behalf, is a fundamental right. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.") (emphasis added); *California v. Trombetta*, 467 U.S. 479, 485 (1984) ("We have long interpreted this standard of [fundamental] fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.") (emphasis added); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense."). In this case, Spisak argues he was unable to present expert evidence about his significant mental health problems, thereby limiting his fundamental right to present a complete defense.

In addition, clearly established Supreme Court precedent holds that a state violates a defendant's right to a fair trial when it prevents him from introducing evidence essential to his defense. *Crane v. Kentucky*, 476 U.S. 683,

690 (1986) (concluding that the state court's refusal to allow the defendant to introduce testimony regarding the circumstances in which he confessed to the police deprived him of a fair trial); *Chambers*, 410 U.S. at 302 (holding that the state court's exclusion of evidence critical to defendant's defense, coupled with the refusal of the state to let the defendant cross examine a witness, denied him due process). In *Chambers*, the defendant argued that the state court violated his constitutional rights when it rejected potentially exculpatory witness testimony because it was hearsay not meeting any recognized exceptions. The *Chambers* Court acknowledged the need for defendants wishing to present evidence to comply with a state's "established rules of procedure and evidence," and stated that "perhaps no rule of evidence has been more respected or more frequently applied in jury trials" than the hearsay rule. Id. at 302. Nevertheless, because the evidence proffered by the defense "bore persuasive assurances of trustworthiness" and "also was critical to [the defendant's] defense," the Court concluded that the defendant's constitutional rights required its admission. *Id.* The Court stated, "[i]n these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.*

In *Crane*, the Supreme Court also held that state evidentiary rules must sometimes give way to a defendant's constitutional rights. The Court stated that a defendant's constitutional right to be heard "is an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence." *Crane*, 476 U.S. at 690. The *Crane* Court recognized the traditional respect afforded to the states in determining their own criminal trial procedures and rules. Notwithstanding the Court's "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by

state trial courts," the Court held, "we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." *Id.* at 689-90 (emphasis added). The Court stated, the "[p]etitioner's entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed." *Id.* at 691 (emphasis added). The Court noted that it was not passing judgment "on the strength or merits of that defense," but that it thought "it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of [the defense] succeeding." *Id.* (emphasis added).

Here, Spisak's expert evidence (including Markey's testimony and the reports prepared by Bertschinger and the other experts) was as integral to Spisak's entire defense as was the hearsay evidence in *Chambers* and the confession evidence in *Crane*. Here the trial court mechanistically applied the evidentiary relevancy standard, resulting in the "blanket exclusion of the proffered testimony" of experts relating to his mental health. Crane, 476 U.S. at 690. Spisak's "entire defense" was that he was legally insane and therefore did not possess the culpability necessary to commit the murders, and it is "plain" that his ability to introduce expert evidence of his mental problems was "indispensable" if his insanity defense was going to have any chance of succeeding. *Id.* at 691. The proffered expert evidence also appears to meet the levels of reliability that the Court demanded in *Chambers* and *Crane*. Spisak's expert testimony came from "competent, reliable" psychiatric and psychological experts repeatedly relied upon by the Ohio courts, *Crane*, 476 U.S. at 690, and it "bore persuasive assurances of trustworthiness." *Chambers*, 476 U.S. at 302. The evidence would have been subject to cross examination by prosecutors, allowing them ample opportunity to point out the numerous conclusions

contrary to Spisak's insanity defense. Yet without this evidence, the question of Spisak's sanity never even reached the jury. In light of these Supreme Court precedents holding that a defendant must be allowed to present evidence critical to his defense, I would conclude that the Supreme Court of Ohio's summary rejection of Spisak's claim was an unreasonable application of clearly established Supreme Court precedent. I would remand this case to the district court with instructions to grant a conditional writ of habeas corpus, giving the State of Ohio 180 days to retry Spisak or release him from custody.

APPENDIX B

No. 03-4034

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRANK G. SPISAK, JR., Petitioner-Appellant

v.

BETTY MITCHELL, WARDEN, Respondent-Appellee.

ORDER

BEFORE: MARTIN, MOORE, and CLAY, Circuit Judges.

The court having received a petition for rehearing en bane, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en bane, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FRANK G. SPISAK, JR.,

Petitioner,

v.

RALPH COYLE, WARDEN,

Respondent

Case No.: 1 :95 CV 2675
JUDGE SOLOMON OLIVER, JR.
MEMORANDUM OF OPINION AND ORDER

Frank G. Spisak, ("Spisak" or "Petitioner") petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Spisak submitted a Petition on April 9, 1997 (Doc. No. 19). Spisak challenges the constitutional sufficiency of his jury convictions for four counts of aggravated murder with nineteen death penalty specifications, three counts of aggravated robbery, and one count of attempted murder. Spisak also challenges the trial court's imposition of the death penalty for his murder convictions. The Respondent, represented by the Ohio Attorney General, filed a Return of Writ (Doc. No. 35), to which Spisak filed a Traverse on September 24, 1997 (Doc. No. 79).

For the reasons discussed below, the court denies Spisak's Petition for writ of habeas corpus.

I. PROCEDURAL HISTORY

On March 29, 1983, the Cuyahoga County Grand Jury indicted Spisak on four counts of aggravated murder in violation of Ohio Rev. Code § 2903.01; three counts of aggravated robbery in violation of Ohio Rev. Code § 2911.01; one count of attempted murder in violation of Ohio Rev. Code § 2903.02, and one count of receiving stolen property in violation of Ohio Rev. Code § 2913.51. Pursuant to Ohio Rev. Code § 2929.04(A), the aggravated murder counts contained nineteen death penalty specifications.

Spisak entered a plea of not guilty by reason of insanity as to all counts on April 8, 1983. Prior to trial, the court ordered Spisak to be evaluated by Dr. Philip Resnick, a psychiatrist, pursuant to Ohio Rev. Code § 2945.39. Upon Spisak's request, the court ordered he also be evaluated by Dr. Sandra McPherson, Dr. Kurt Bertschinger, Dr. S.M. Samy and Dr. Oscar Markey. Thereafter, the court held a hearing to determine whether Spisak was competent to stand trial. Dr. Resnick determined that Spisak was competent to stand trial. The court agreed with Dr. Resnick's findings.

Spisak also moved to suppress evidence seized at the search of his home on September 4, 1982. The court held a hearing on the motion but subsequently denied it, finding that Spisak's Fourth and Fourteenth Amendment rights were not violated during the police search and seizure of guns found in Spisak's apartment.

Following trial, a jury convicted Spisak on July 27, 1983, of all counts and specifications, with the exception of one of the aggravated robbery counts. After the mitigation phase of the trial, the jury determined the aggravating

circumstances outweighed the mitigating factors and recommended a sentence of death. The trial court accepted the jury's recommendation and sentenced Petitioner to death for each charge of aggravated murder on August 10, 1983. In addition, the trial court sentenced Spisak to terms of seven to twenty-five years on each conviction of attempted murder and aggravated robbery.

Spisak timely appealed his convictions to the Ohio Court of Appeals for the Eighth District.[1] The Court of Appeals affirmed the conviction after vacating the aggravated murder conviction on the fifth count of the indictment as well as the five specifications attached thereto. *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992 (Ohio Ct. App. July 19, 1984).[2] On September 12, 1984, Spisak filed a timely Notice of Appeal to the Ohio Supreme Court.

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[1] Originally, Spisak's appellate counsel raised one claim on appeal: "Whether or not the trial court erred by ruling that before an expert doctor could testify before the jury that the expert doctor must have found the defendant-appellant to be 'legally insane.'" Petition at 8. Spisak's initial appellate counsel were the same counsel who represented him during trial.

[2] The Grand Jury had indicted Spisak on two counts of aggravated murder for the murder of Timothy Sheehan pursuant to Ohio Rev. Code § 2941.25(A) which reads:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

Consequently, the Court of Appeals determined that although Spisak was properly indicted for two counts of aggravated murder in connection with Sheehan's death, he could only be convicted of one of those counts. The Court of Appeals, thus, vacated one of the convictions. *Id.* at *7.

Thereafter, Spisak received new counsel from the Ohio Public Defender Commission, who filed a motion to remand the case based upon previous counsel's failure to have the entire trial transcript submitted to the appellate court as required by Ohio Rev. Code § 2929.03(G). The Ohio Supreme Court granted the motion and ordered the Court of Appeals to undertake a second review after receiving the supplemented record. Spisak then moved the Court of Appeals to permit him to raise additional assignments of error. The court denied the motion and reaffirmed Spisak's convictions and death sentence. Spisak again filed a motion to remand with the Ohio Supreme Court, requesting that court to instruct the Court of Appeals to permit Spisak's new counsel to raise additional issues. On November 6, 1985, the Ohio Supreme Court granted the motion "with specific instructions to the court that counsel for Appellant be permitted to participate in the review process as required by the Sixth and Fourteenth Amendments of the United States Constitution." Petition at 11. After accepting a new twenty-page brief and holding two hearings in which Spisak's new counsel participated, the Court of Appeals again affirmed Spisak's convictions. *State v. Spisak*, No. 82884, slip op. (Ohio Ct. App. May 27, 1986). On July 2 I, 1986, Spisak moved the Ohio Supreme Court for a third remand, alleging that the Court of Appeals failed to follow the Supreme Court's November 6, 1985 Order. The Supreme Court, however, denied the motion.

On November 24, 1986, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four propositions of law.[3] The Ohio Supreme Court affirmed Spisak's

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[3] In his brief to the Ohio Supreme Court, Petitioner raised the following propositions of law:

> 1. Instructing the jury in the penalty phase on nineteen separate aggravating circumstances to four aggravated

murder charges where there were but three killings destroys the reliability of the sentencing procedure in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9,10, and 16, Article I, of the Ohio Constitution.

2. The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution guarantee the accused the rights to cross-examine witnesses, have testimony adduced only when under oath, and to not be subjected to prosecutorial misconduct. The prosecutor's repeated testimony which was not subject to cross-examination nor under oath concerning appellant's sexual preferences, political beliefs and uncharged acts of misconduct violates these constitutional guarantees.

3. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the effective assistance of counsel at trial. The assistance of counsel appellant received at the guilt phase of trial failed to reach the minimum standard as established by the Ohio and federal Constitution.

4. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article I, Sections 2, 9, 10 and 16 of the Ohio Constitution; and Ohio Revised Code Section 2945.1 1 guarantee the accused a jury charge that instructs the jury as to the defense theory of the case. The failure of the trial court to instruct the jury as to the insanity defense violated these constitutional and statutory protections.

5. The trial judge denied appellant's Fourteenth Amendment right to due process, his Fifth Amendment right to a fair trial and his Sixth Amendment right to have compulsory process for obtaining witnesses in his favor by usurping the jury's fact-finding function and excluding all expert evidence of insanity.

6. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Ohio Evidence Rule 70 I;

and Article I, Sections 10 and 16 of the Ohio Constitution guarantee the accused a right to a fair trial and the right to adduce testimony on his own behalf. The trial court's refusal to permit lay testimony as to appellant's insanity denied appellant these rights.

7. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee the accused a right to a fair trial at which he can testify on his own behalf. The trial couil's refusal to permit appellant's testimony as to his delusional beliefs concerning God and his grandiose thoughts about his guns denied appellant these rights.

8. The Fifth and Fourteenth Amendments of the United States Constitution; Article I, Section 16 of the Ohio Constitution, and Ohio Revised Code Section 2940.02 guarantee an accused that a trial will be conducted in a fair manner in which the trial court bases its rulings upon the evidence and does [sic] comment to the jury concerning the credibility of the evidence. The trial court's exclusion and striking, in the presence of the jury of the expert's testimony which it had previously ruled admissible only after a lengthy voir dire, violated these constitutional guarantees.

9. The Fourteenth Amendment to the United States Constitution; Article I, Section 16 of the Ohio Constitution; and Ohio Revised Code Section 2929.05 require that the trial court keep a complete and full transcript of all proceedings occurring during the trial court. The trial court's failure to maintain such a record during the voir dire and pretrial motions denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

10. The Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee an accused the right of due process of law. The trial court erred when it placed upon appellant the burden of proof and the burden of going forward on appellant's motion to suppress

evidence, which denied appellant his constitutional guarantees.

11. The Fourth Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment; and Article I, Section 14 of the Ohio Constitution prohibits the police from making a warrant less and non-consensual entry into a suspect's home. The trial court's failure to suppress evidence obtained in a warrant less and non-consensual entry into appellant's home denied appellant his rights guaranteed by the United States and Ohio Constitutions.

12. The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment; and Article I, Section 14 of the Ohio Constitution prohibit the police from making a warrantless and non-consensual entry into a third party's home without first obtaining a search warrant. The testimony and exhibits received into evidence by the court which had been obtained by the illegal entry into Ronald Reddish's house denied appellant his rights as guaranteed by the United Stated and Ohio Constitutions.

13. The Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution prohibit the police from making a warrantless and non-consensual search and seizure of an automobile. The evidence obtained from the warrantless search and seizure of Ronald Reddish's automobile denied appellant his rights as guaranteed by the United States and Ohio Constitutions.

14. The Eighth and Fourteenth Amendments to the United States Constitution and Sections 19 and 16, Article I, of the Ohio Constitution protect an accused against the infliction of cruel and unusual punishment and guarantee an accused due process of law. The trial court's and prosecutor's repeated comments to the jury that the jury's death penalty verdict was only a recommendation and not binding upon the trial judge

violated appellant's rights as guaranteed by the United States and Ohio Constitutions.

15. The Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections 10 and 16 of the Ohio Constitution and Section 2945.25(C) of the Ohio Revised Code guarantee an accused a fair trial and impartial jury. The trial court's exclusion of potential juror Thomas J. Schmitt, over defense counsel's objection denied appellant these constitutional guarantees.

16. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution require that jurors decide the case based upon evidence and testimony received inside the courtroom and not from conversation occurring outside the court room. The trial court's failure to sequester and admonish the potential jurors in the present case denied appellant his rights as guaranteed by the United States and Ohio Constitutions.

17. The Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution require the presence of the defendant at all stages of the trial absent compelling circumstances. The trial court's failure to have appellant present for the excusal for cause of jurors violated such rights.

18. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 10 and 16 of the Ohio Constitution guarantee an accused a right to a fair and impartial trial by jury. The ineffective assistance of counsel which appellant received during the jury selection process resulted in a denial of appellant's constitutional right to a fair and impartial trial by jury.

19. The Eighth and Fourteenth Amendment of the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution require that the jury impose the death penalty only when it is the appropriate

penalty. The prosecutor's comments during voir dire that the jury must return such penalty when the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt violated such rights.

20. The Fourteenth Amendment to the United States Constitution; Article I, Section 16 of the Ohio Constitution; and Ohio Revised Code Section 2929.05 require that the trial court keep a complete and full transcript of all proceedings occurring in the trial court. The trial court's failure to maintain such a record of the jury view denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

21. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee a defendant a right to a fair trial. The trial court abused its discretion and denied appellant a fair trial by allowing the appellant to appear before the jury in shackles.

22. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution guarantee an accused a right to a fair trial. The trial court denied appellant his fair trial when he failed to give the jury an instruction on shackling.

23. The Fourteenth Amendment to the United States Constitution; Section 16, Article I, of the Ohio Constitution; and R.C. 2929.05 require the trial court to keep a complete record of all proceedings and its failure to maintain such a record during the guilt phase denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

24. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections IO and 16 of the Ohio Constitution guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by calling Clem

H. Sharkey, a friend and relative of the victim, Reverend Horace Rickerson, interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and, therefore, violated the above cited constitutional principles.

25. The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by adducing testimony from the victim John Hardaway concerning his background and the extreme pain that the shooting caused him interjected sympathy and passion into the judicial process, thereby violating the above cited constitutional principles.

26. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The State of Ohio, by calling Kathleen Sheehan, the wife of the victim, Timothy Sheehan, interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and, therefore, violated the above cited constitutional principles.

27. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee a defendant a right to a fair trial. The trial court denied appellant a fair trial when it permitted the State of Ohio to elicit testimony from witness Charles Ronkas, the sole effect of the testimony was to elicit sympathy for the victim and to add no probative evidence to the elements of the crimes for which appellant was indicted.

28. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by

calling Barbara Chapman, the employer of the victim, Brian T. Warford, interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and, therefore, violated the above cited constitutional principles.

29. The Fifth and Sixth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution and Ohio Evidence Rule 802 guarantee a defendant the right to a fair trial through the right of cross examination of the state's witnesses. The trial court's admission of the results of the toxicologist's reports as to Horace Rickerson violated these rights guaranteed by the Ohio and United States Constitution and Ohio Rules of Evidence.

30. The Fifth and Sixth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution and Ohio Evidence Rule 802 guarantee a defendant the right to a fair trial through the right of cross-examination of the state's witnesses. The trial court's admission of the results of the pathologist's reports as to Timothy Sheehan violated these rights guaranteed by the Ohio and United States Constitutions and Ohio Rules of Evidence.

31. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 16 of the Ohio Constitution, guarantee an accused a fair trial whose outcome will be as free as possible from bias and sympathy. The state of Ohio, by requesting that pathologists speculate as to the order the bullets struck the victim and the impact each bullet had upon each victim interjected sympathy and passion into the judicial process while contributing nothing to the matters in issue and thereby violated the above cited constitutional principles.

32. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of the appellant by

allowing gruesome, prejudicial, and cumulative pictures into evidence when the prejudicial effect of these pictures clearly outweighed the probative value.

33. The Fifth and Fourteenth Amendments to the United States Constitution, Section 2945.35 of the Ohio Revised Code, and Article I, Section 16 of the Ohio Constitution guarantee the accused the right to a fair trial. The trial court's failure to exclude from the jury's consideration evidence which the trial court had already ruled was inflammatory and prejudicial violated appellant's rights as guaranteed by the federal and Ohio Constitutions and 2945.35 of the Ohio Revised Code.

34. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of the appellant by allowing gruesome, prejudicial, and cumulative testimony concerning the death of Horace Rickerson when it was clear that the prejudicial effect of this testimony outweighed the probative value.

35. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of the appellant by allowing gruesome, prejudicial, and cumulative testimony concerning the death of Timothy Sheehan when it was clear that the prejudicial effect of this testimony outweighed the probative value.

36. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of the appellant by allowing gruesome, prejudicial, and cumulative testimony concerning the death of Brian Warford when it was clear that the prejudicial effect of this testimony outweighed the probative value.

37. The Fifth and Sixth Amendments to the United States Constitution; Article I, Section 10 of the Ohio Constitution and Ohio Evidence Rule 802 guarantee a defendant the right to a fair trial through the cross-examination of the state witnesses. The trial court's admission of the testimony of Theodore Budzik concerning the contents of a telephone conversation he had with an unidentified informant violated these rights as guaranteed by the Ohio and United States Constitutions and the Ohio Rules of Evidence.

38. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the rights of due process and a fair and impartial trial. The trial court erred to the prejudice of appellant by admitting testimony concerning appellant's prior acts of shooting out the window of his apartment.

39. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantees an accused the right to due process of law and a fair trial. The trial court's admission of testimony concerning firearms which were found among the belongings of appellant, but said weapons were not connected to the crimes for which appellant was charged, violated the above cited constitutional provisions and Ohio Evidence Rules 401, 402, and 403.

40. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantees an accused the right to due process of law and a fair trial. When a trial court allows testimony and evidence to be presented concerning property of the defendant, such as an anarchist cookbook which is inflammatory and prejudicial, violated the above cited provisions and Ohio Evidence Rules 401, 402, and 403.

41. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 and 16 of the Ohio Constitution guarantee an accused the right

to a fair trial and due process of law. The trial court's repeated admission of prior uncharged acts of assaultive conduct by appellant violated these rights.

42. The Fifth and Fourteenth Amendment to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution, guarantee the accused the right to a fair trial and that the state will not suppress exculpatory or favorable evidence. The State of Ohio's suppression of evidence that Betty Braun was unable to select Ronald Reddish in a lineup was a violation of such constitutional guarantees.

43. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee that a custodial statement not be admitted in court unless the accused, prior to giving such statement has been informed of his *Miranda* rights. The admission of appellant's statement to Dr. Resnick violated such rights.

44. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee that an accused's post-arrest silence will not be used against him. When a prosecutor deliberately tells the jury that the accused exercised his *Miranda* right to remain silent, the accused's constitutional guarantees are violated.

45. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused a right to a fair trial and a right to confront witnesses. When a prosecutor testifies on his own and allows a witness to testify, without being sworn, the above cited rights are violated.

46. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution guarantee the accused the rights to cross-examine witnesses, have testimony adduced only when under oath, and to not be subjected

to prosecutorial misconduct. The prosecutor's repeated testimony which was not subject to cross-examination nor under oath concerning appellant's political beliefs violates these constitutional guarantees.

47. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution; Article I, Sections l0 and 16 of the Ohio Constitution guarantee an accused the right to a fair trial and due process of law. The trial court's repeated admission of prior uncharged acts of assaultive conduct by appellant toward his wife violated these rights.

48. The Fourteenth Amendment to the United States Constitution; Section 16, Article I, of the Ohio Constitution; and R.C. 2929.05 require the trial court to keep a complete record of all proceedings. Its failure to maintain such a record during the mitigation phase denied appellant his rights as guaranteed by the United States and Ohio Constitutions and Ohio Revised Code.

49. The Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and l6 of the Ohio Constitution guarantee the defendant a fair trial free from prosecutorial misconduct. The repeated statements in the mitigation phase by the prosecutor that were not supported by the evidence violated these rights.

50. The defense has the burden of going forward with evidence at the penalty phase of a capital trial. The state may then only rebut specific evidence presented by the defense in mitigation. Where the state presents irrelevant and inflammatory evidence that does not rebut any evidence presented in mitigation, the delicate balancing system is upset and the reliability of the sentencing procedure is destroyed in violation of the Eighth and Fourteenth Amendments and Article I, Sections 9 and l6 of the Ohio Constitutions.

51. Failing to instruct the jury concerning the appellant's constitutional right not to testify at the penalty phase, denied appellant's rights as guaranteed

by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution.

52. Jury instructions that penl1it a finding of death where "you are firmly convinced of the truth of the charge" destroy the reliability of the sentencing procedure in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I, of the Ohio Constitution.

53. Charging the jury at the penalty phase that it could consider any factor it desired in determining the appropriate penalty violated appellant's rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

54. Jury instructions requiring unanimity for a life verdict at the penalty phase deny the accused his right to a fair trial and freedom from cruel and unusual punishment in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

55. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 16 of the Ohio Constitution guarantee the accused a fair trial and freedom from cruel and unusual punishment. The trial court's instruction in the mitigation phase prohibiting consideration of mercy and sympathy violated such rights.

56. Ohio's mandatory sentencing scheme prevented the jury from deciding whether death was the appropriate punishment in violation of appellant's rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I, of the Ohio Constitution.

57. Appellant was denied effective assistance of counsel in the mitigation portion of the trial as

guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I, of the Ohio Constitution.

58. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee an accused the right to a fair trial and to the effective assistance of counsel. When defense counsel fails to preserve error he is denied effective assistance of counsel as guaranteed by the above constitutional provisions.

59. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 5, 10 and 16 of the Ohio Constitution guarantee an accused the right to effective assistance of counsel when entering a no contest plea. The assistance of counsel which appellant received when entering his no contest plea to attempted murder did not fall within the range of professionally acceptable conduct and thereby appellant was deprived of his right to effective assistance of counsel.

60. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution guarantee a convicted defendant a right to a fair appeal and effective assistance of counsel when such appeal is an appeal-of-right. The Eighth District Court of Appeals steadfast refusal to permit counsel for appellant to raise and brief any issues on either the first or second remand from the Ohio Supreme Court of this case violated such rights.

61. Appellant's original counsel by raising only a single issue in appellant's initial appeal violated appellant's rights as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution.

62. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Section 10 and 16 of the Ohio Constitution and Ohio Revised Code Section 2929.05 guarantee a convicted defendant a fair

conviction. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988). Spisak then petitioned the United States Supreme Court for a writ of certiorari, but his petition was denied.[4] *Spisak v. Ohio*, 489 U.S. 1071 (1989).

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and impartial review of his death sentence. The statutorily mandated proportionality process in Ohio is fatally flawed thereby denying appellant the above rights.

63. The Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Sections 9 and 16, Article I, of the Ohio Constitution and Revised Code Section 2929.05 guaranteed that the sentence imposed in a capital trial will be reliable. When both the guilt and mitigation phases of a capital trial are replete with errors, the sentence of death is unreliable and inappropriate.

64. The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 9, 10 and 16 establish the requirements for a valid death penalty scheme. Ohio Revised Code Sections 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 929.04, 2929.05, Ohio's statutory provisions governing the imposition of the death penalty do not meet the prescribed requirements and, thus, are unconstitutional, both on their face and as applied to appellant.

[4] Spisak raised the following two claims to the United States Supreme Court:

1. Whether the Ohio Supreme Court's Failure to review any of the errors presented to it by a capitally convicted appellant, although review is required by Ohio Statute, constitutes a violation of the Eighth and Fourteenth Amendments and is contrary to this Court's rulings in *Gregg v. Georgia* and its progeny.

2. Whether an instruction, although "technically" accurate, stressing the preliminary nature of a jury's decision of a death sentence in a capital case so

On November 1, 1989, Spisak filed a petition for post-conviction relief pursuant to Ohio Rev. Code § 2953.21.[5] The trial court denied Spisak relief on June 12,

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misleads a jury about the importance of its decisions and diminishes its sense of responsibility for that decision as to increase the likelihood of a death verdict, thereby destroying the reliability of sentencing procedure is unconstitutional.

[5] After amending his petition four times, Spisak raised the following causes for relief:

1. The judgment against Petitioner Spisak is void or voidable because the trial court instructed the Petitioner's jury in the penalty phase of Petitioner's trial on nineteen (19) separate aggravating circumstances to four aggravated murder charges when there were only three murders, thus destroying the reliability of the sentencing proceedings in violation of Petitioner's constitutional rights as guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

2. The judgment against Petitioner Spisak is void or voidable because he was denied his constitutional rights to a fair trial, an impartial jury and the effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 5, 10 and 16,

Article I of the Ohio Constitution when Petitioner's trial counsel failed to move the trial court for a change of venue and further failed to conduct voir dire of potential jurors to detenl1ine the impact and influence of the inflammatory and pervasive publicity attendant on potential jurors.

3. The judgment against Petitioner Spisak is void or voidable due to the error committed by the trial court in placing the burden of proof and the burden of going forward upon the Petitioner during a hearing on his

motion to suppress evidence thereby violating Petitioner's rights as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Sections 14 and 16, Article I of the Ohio Constitution.

4. The judgment against Petitioner Spisak is void or voidable because evidence used against him during his trial was obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Sections 14 and 16, Article I of the Ohio Constitution.

5. The judgment against Petitioner Spisak is void or voidable because the arrest of the Petitioner and evidence obtained during the arrest violated the requirements of the Fourth and Fourteenth Amendments of the United States Constitution and Sections 14 and 16, Article I of the Ohio Constitution.

6. The judgment against Petitioner Spisak is void or voidable due to the illegal seizure and search of the 1975 Buick LeSabre.

7. The judgment against Petitioner Spisak is void or voidable because the trial court's and prosecutor's repeated comments to the jury that the jury's death penalty verdict was only a recommendation and not binding upon the trial judge violated the Petitioner's constitutional rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

8. The judgment against Petitioner Spisak is void or voidable because he was deprived of a fair trial and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution due to the trial court's exclusion of potential juror Thomas J. Schmitt.

9. The judgment against Petitioner Spisak is void or voidable due to the trial court's failure to sequester and admonish potential jurors.

10. The judgment against Petitioner Spisak is void or voidable because the trial court failed to ensure that Petitioner Spisak was present when jurors were excused for cause. (VD Tr. 411-416.)

11. The judgment against Petitioner Spisak is void or voidable because the jury's determination that death was appropriate in his case was impermissibly influenced by the prosecutor's comments during voir dire that the jury must return such penalty when the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt in violation of Petitioner's rights pursuant to the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

12. The judgment against Petitioner Spisak is void or voidable due to the failure of the trial court to have the jury view recorded.

13. The judgment against Petitioner Spisak is void or voidable because the trial court abused its discretion by allowing Petitioner to appear before the jury in shackles in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

14. The judgment against Petitioner Spisak is void or voidable due to the trial court's failure to insure that the jury's deliberations and verdict remained untainted by instructing the jury regarding the shackling of Petitioner.

15. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim Horace Rickerson.

16. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim John Hardaway.

17. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim Timothy Sheehan.

18. The judgment against Petitioner Spisak is void or voidable due to the injection of bias and sympathy by the State of Ohio for victim Brian Warford.

19. The judgment against Petitioner Spisak is void or voidable because Petitioner was denied his right to confrontation when the coroner testified concerning a toxicologist examination she did not perform.

20. The judgment against Petitioner Spisak is void or voidable because Petitioner was denied his right to confrontation when a coroner who had not performed the autopsy on Timothy Sheehan testified as to the autopsy.

21. The judgment against Petitioner Spisak is void or voidable due to the introduction of bias and prejudice into the proceedings in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

22. The judgment against Petitioner Spisak is void or voidable due to the introduction of eighty-one gruesome pictures during his trial.

23. The judgment against Petitioner Spisak is void or voidable because Petitioner's right to a fair trial, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution was violated due to the trial court's failure to exclude from the jury's consideration evidence that the trial court had already ruled was prejudicial and inflammatory.

24. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial and

cumulative testimony concerning the death of Horace Rickerson.

25. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial and cumulative testimony concerning the death of Timothy Sheehan.

26. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial and cumulative testimony concerning the death of Brian Warford.

27. The judgment against Petitioner Spisak is void or voidable due to the use of hearsay information by the State.

28. The judgment against Petitioner Spisak is void or voidable due to the admission of prejudicial evidence concerning prior acts committed by Petitioner.

29. The judgment against Petitioner Spisak is void or voidable due to the admission of testimony concerning firearms that were found among the Petitioner's belongings and unrelated to any of the crimes Petitioner was charged with.

30. The judgment against Petitioner Spisak is void or voidable due to the admission of irrelevant and prejudicial evidence admitted against Petitioner.

31. The judgment against Petitioner Spisak is void or voidable due to the admission of testimony concerning uncharged acts of assaultive conduct by Petitioner.

32. The judgment against Petitioner Spisak is void or voidable due to the State of Ohio's withholding of exculpatory or favorable evidence.

33. The judgment against Petitioner Spisak is void or voidable because he was denied the right to testify on his own behalf as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

34. The judgment against Petitioner Spisak is void or voidable because prosecutorial misconduct denied him the right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

35. The judgment against Petitioner Spisak is void or voidable due to the admission of Petitioner's post-arrest silence at his trial against him.

36. The judgment against Petitioner Spisak is void or voidable when the prosecutor testified without being sworn and allowed a witness to testify without being sworn.

37. The judgment against Petitioner Spisak is void or voidable because his rights to cross-examine witnesses and have testimony adduced only under oath as guaranteed under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution were violated by the prosecutor's repeated testimony which was not subject to cross-examination or under oath concerning Petitioner's political beliefs.

38. The judgment against Petitioner Spisak is void or voidable because the trial court usurped the jury's fact-finding function by excluding all expert evidence of insanity therefore denying Petitioner his rights to due process, a fair trial and compulsory process for obtaining witnesses in his favor as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

39. The judgment against Petitioner Spisak is void or voidable because he was deprived of his right to a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution when the trial court excluded and struck, in the presence of the jury, expert testimony that the court had previously ruled admissible after concluding a lengthy

examination of the expert out of the presence of the jury.

40. The judgment against Petitioner Spisak is void or voidable because he was denied the right to a fair trial and to compulsory process as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

41. The judgment against Petitioner Spisak is void or voidable due to the introduction of evidence through cross-examination by the prosecutor concerning uncharged acts of assaultive conduct.

42. The judgment against Petitioner Spisak is void or voidable due to the admission of statements made to a psychiatrist without the benefit of *Miranda* warnings.

43. The judgment against Petitioner Spisak is void or voidable because he was denied a fair trial when the trial court failed to instruct the Petitioner's jury as to the insanity defense which constituted the defense theory of Petitioner's case in violation of Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

44. The judgment against Petitioner Spisak is void or voidable because he was denied a fair trial free from prosecutorial misconduct as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution due to the repeated statements in the mitigation phase by the prosecutor that were not supported by the evidence.

45. The judgment against Petitioner Spisak is void or voidable because at the mitigation phase of Petitioner's trial the State presented inflammatory and irrelevant evidence that did not rebut any evidence presented in mitigation, upset the delicate balancing system and destroyed the reliability of the sentencing determination

in violation of Petitioner' s rights under the Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 10, Article I of the Ohio Constitution.

46. The judgment against Petitioner Spisak is void or voidable because the trial court failed to instruct the jury concerning the Petitioner's constitutional right not to testify at the mitigation phase as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

47. The judgment against Petitioner Spisak is void or voidable because the jury at Petitioner's trial was given an instruction that permitted a finding of death where the Petitioner's jury was "firmly convinced of the truth of the charge" thus destroying the reliability of the sentencing procedure in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10, and 16, Article I of the Ohio Constitution.

48. The judgment against Petitioner Spisak is void or voidable because the jury in his case, at the penalty phase, was charged that it could consider any factor it desired in determining the appropriate penalty in violation of Petitioner's rights as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article I of the Ohio Constitution.

49. The judgment against Petitioner Spisak is void or voidable because the trial court instructed Petitioner's jury at the penalty phase of Petitioner's trial that the jury's recommendation as to a sentence had to be unanimous.

50. The judgment against Petitioner Spisak is void or voidable because the trial court's instruction at the mitigation phase of the trial, prohibiting the jury from considering mercy or sympathy, violated Petitioner's rights to a fair trial and freedom from cruel and unusual

punishment pursuant to the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9 and 16, Article 1 of the Ohio Constitution.

51. The judgment against Petitioner Spisak is void or voidable because the trial court failed to keep a complete and full transcript of all proceedings occurring in the trial court thus violating Petitioner's constitutional rights as guaranteed under the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

52. The judgment against Petitioner Spisak is void or voidable because the Petitioner was denied the effective assistance of counsel at all phases of his capital trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

53. The judgment against Petitioner Spisak is void or voidable due to the mandatory nature of Ohio's capital statute.

54. The judgment against Petitioner Spisak is void or voidable because instructions given to the jury in the penalty phase of his capital trial misled the jury as to its sentencing role and the scope of its discretion.

55. The judgment against Petitioner Spisak is void or voidable because Petitioner was denied the effective assistance of counsel when he entered a no contest plea to the charge of attempted murder of John Hardaway in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 5, 10, and 16, Article I of the Ohio Constitution.

56. The judgment against Petitioner Spisak is void or voidable because he was denied his right to the effective assistance of counsel when Petitioner's original counsel raised only a single issue in Petitioner's initial appeal in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I of the Ohio Constitution.

57. The judgment against Petitioner Spisak is void or voidable because he was denied the effective assistance of counsel on his appeal of right when the Eighth District Court of Appeals refused to permit the Petitioner's counsel to raise and brief any issues on either the first or second remand from the Ohio Supreme Court in Petitioner's case and the Ohio Supreme's Court failure to address any of the issues raised there in violation of Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 9, 10 and 16, Article I of the Ohio Constitution.

58. The judgment against Petitioner Spisak is void or voidable because he was denied a fair and impartial review of his death sentence as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

59. The judgment against Petitioner Spisak is void or voidable due to the failure of the Ohio Supreme Court to provide the level of review constitutionally required in capital cases by the Eighth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

60. The judgment against Petitioner Spisak is void or voidable because the guilt and mitigation phases of his trial were replete with errors, making his sentence of death unreliable and inappropriate in violation of his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution. The errors and failures of counsel, the prosecutor, and the trail court were left uncorrected and were compounded by counsel's failures in the Court of Appeals, by the Court of Appeals' refusal to permit new counsel to raise errors

on the two remands, and by the failure of the Ohio Supreme Court to give this case any more than a cursory and arbitrary review. The judicial system failed to give Frank Spisak a fair trial, a reliable sentencing determination, a fair review to insure against the arbitrary and capricious imposition of the death sentence, either in the Court of Appeals or the Ohio Supreme Court. Any death sentence imposed as the result of these numerous failures throughout the judicial system can never be deemed appropriate.

61. The Ohio death penalty scheme is unconstitutional on its face in violation of the United States Constitution and Ohio Constitution.

61(a). The death penalty violates the prohibition under the Eighth Amendment to the United States Constitution against cruel and unusual punishment and Section 9, Article I of the Ohio Constitution.

61(b). The death penalty in Ohio is applied in an arbitrary and capricious fashion since it permits prosecutors to exercise discretion in deciding who will be charged with capital offenses.

61(c). The Ohio death penalty scheme fails to require premeditation or deliberation as the culpable mental state for defendants in all capital cases.

61(d). R.C. 2929.03 sets forth no standard of proof to be applied in determining mitigating factors.

61(e). R.C. 2020.03 fails to give the jury a standard with which to balance mitigating factors against the aggravating circumstances.

61(f). The consideration of aggravating circumstances at the guilt phase of the trial is unconstitutional.

61(g). R.C. 2020.03 and 2929.04 are unconstitutional in that they treat felony murders more harshly than premeditated murder.

61(h). The Ohio death penalty scheme is unconstitutional in that it does not give the sentencing

authority the option to impose a life sentence, or give mercy, when it finds that the aggravating circumstances outweigh the mitigating factors.

61(i). The Ohio death penalty scheme is unconstitutional because a bifurcated trial with the same jury denies the defendant an impartial jury and the effective assistance of counsel.

61(j). The Ohio death penalty scheme is unconstitutional because in conjunction with Crim. R. 11(C)(3), it encourages defendants to waive their fundamental rights and enter guilty pleas.

61(k). The Ohio death penalty scheme totally eliminates sentencing discretion.

61(l). The Ohio death penalty scheme is unconstitutional because it mandates that a jury must recommend death if it finds that the aggravating circumstances outweigh the mitigating factors at the sentencing phase of the trial.

61(m). The Ohio death penalty scheme fails to provide equal protection to persons convicted of the same or similar crimes.

61(n). The Ohio death penalty is applied in an arbitrary and discriminatory manner.

61(o). The Ohio death penalty is unconstitutional because Ohio has failed to show a legitimate and compelling state interest in executing persons.

61(p). The Ohio death penalty statute is unconstitutional because the statute impermissibly devalues the importance of mitigation because no method exists to ensure a proper "weighing and consideration" is accomplished.

61(q). The Ohio death penalty statute is unconstitutional because it requires a defendant to prove mitigation by a preponderance of evidence.

61(r). The Ohio death penalty statutes are unconstitutional because of the arbitrary and capricious

1992, *State v. Spisak*, No. CR 181411, slip op. (Ohio Ct. Common Pleas June 11, 1992). The Court of Appeals affirmed the trial court's decision. *State v. Spisak*, No. 67229, 1995 WL 229108 (Ohio Ct. App. Apr. 13, 1995). Thereafter, Spisak attempted to file an application to re-open his direct appeal pursuant to Ohio Rule of Appellate Procedure 26(B). The Court of Appeals determined, however, that Spisak could not demonstrate "good cause," required under the statute, for filing his application more than ninety days after the journalization of his direct appeal. *State v. Spisak*, 652 N.E.2d 719 (Ohio Ct. App. 1995). Thus, the Court of Appeals denied Spisak's application.

Spisak next filed a Notice of Intent to file a petition for writ of habeas corpus with this court on December 15, 1995 (Doc. No. 1). After filing the Petition, Spisak moved the court to stay his execution on June 13, 1997 (Doc. No. 54). The court granted the motion (Doc. No. 60).

II. FACTS

When the Ohio Supreme Court considered Spisak's direct appeal, it set out the factual history the case as revealed by the evidence adduced at Spisak's trial. *State v. Spisak*, 521 N.E.2d 800, of 800-01 (Ohio 1988). This court repeats that

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application of appellate review procedures by the Courts of Appeals and Ohio Supreme Court resulting in no meaningful appellate review.

61(s). To execute the Petitioner pursuant to a death sentence secured under an unconstitutional death penalty scheme would be prejudicial to Petitioner and would violate the Eighth Amendment and the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and Sections 2, 9, 10 and 16, Article I of the Ohio Constitution.

factual history here, using the Ohio Supreme Court's language.

> On February 1, 1982, the body of the Reverend Horace T. Rickerson was discovered by a fellow student on the floor of a restroom on the Cleveland State University campus. Rickerson had been shot seven times by an assailant from a distance of more than eighteen inches. Four spent bullet casings were recovered from the scene.
>
> On the evening of June 4, 1982, John Hardaway was shot seven times while waiting for an RTA train at the West 117th Rapid Station in Cleveland. He observed a man walking up the platform steps and had turned away when the man opened fire on him. Hardaway survived the shooting, and was later able to identify his assailant as Petitioner, Frank G. Spisak. Three pellets and seven shell casings were recovered from the scene.
>
> At approximately 5:00 p.m. on August 9, 1982, Coletta Dartt, an employee of Cleveland State University, left her office to use the restroom. Upon exiting the stall, she encountered Spisak, holding a gun, who ordered her back into the stall. Instead, Dartt shoved Spisak out of the way and ran down the hallway. Spisak shot at her, but missed. A pellet was later removed from a wall in the hallway. Dartt identified Spisak as her assailant.
>
> On August 27, 1982, the body of Timothy Sheehan, an employee of Cleveland State

University, was discovered in a restroom at the university by a security guard. The guard had been searching for Sheehan after his office reported that he had failed to answer his beeper page. Sheehan had been shot four times, and two pellets were retrieved from the scene.

On the morning of August 30, 1982, the body of a young student, Brian Warford, was discovered in a bus shelter on the campus of Cleveland State University. Warford died from a single gunshot wound to the head, although five spent .22 caliber casings were recovered from the scene.

On September 4, 1982, Cleveland police answered a call that a man was firing shots from a window at 1367 East 53rd Street. The police were directed to Spisak's apartment and Spisak, after admitting he had fired one shot, invited the officers inside. A shotgun and a .22 caliber automatic pistol were observed in the room. Spisak made a suspicious move toward the couch but was stopped by one of the officers who discovered a loaded .38 caliber handgun and a two-shot derringer under the couch cushions. Spisak was arrested for possession of unregistered handguns and discharging firearms within city limits, but was later released on bond. The weapons, however, were confiscated. Early the next day, an anonymous caller told police that the confiscated weapons had been used in the Cleveland State University shootings. Ballistics tests confirmed the tip. A warrant

was obtained, and the police returned to Spisak's apartment, confiscating several items including newspaper clippings of the homicides and Nazi-White Power paraphernalia. Spisak was later arrested, hiding in the basement of a friend's house. During a brief search of Spisak's suitcase at the scene, police discovered the beeper pager belonging to Sheehan.

Spisak later admitted to shooting Rickerson for allegedly making homosexual advances toward him; to killing Sheehan as a possible witness to the Rickerson shooting; to killing Warford while on a "hunting party" looking for a black person to kill; and, finally, to shooting at Dartt and to shooting Hardaway. He also told police he had replaced the barrel of the .22 caliber handgun in order to conceal the murder weapon.

Spisak was brought to trial under an eight-count indictment containing twenty specifications, including the aggravated murders of Rickerson, Sheehan and Warford and appurtenant death specifications. Spisak pleaded not guilty and not guilty by reason of insanity, claiming to be a follower of Adolf Hitler. He was found to have been competent, however, at the time of the acts, and the jury returned guilty verdicts on all counts and specifications, except the alleged aggravated robbery of Warford.

Following the mitigation hearing, the jury recommended that the sentence of death be imposed. In a separate opinion, the trial court

concurred, imposing a death sentence. Spisak was also sentenced to terms of seven to twenty-five years on each conviction of attempted murder and aggravated robbery.

III. STANDARD OF REVIEW

Before considering the specific grounds for relief Spisak raised in the Petition, the court must determine whether the amendments to § 2254, requiring greater deference to state court decisions, apply to this case. The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132 § 104, amending 28 U.S.C. § 2254 became effective on April 24, 1996. On September 3, 1997, this court determined that the amendments to 28 U.S.C. § 2254 et seq. were inapplicable to the instant case because the case was pending before the court before the AEDPA's effective date (Doc. No. 72). This court based its decision on *Lindh v. Murphy*, 521 US. 320 (1997), in which the United States Supreme Court held that amended §2254(d) does not apply to habeas corpus cases that were "pending" when the AEDPA was passed. This court determined that a habeas case commenced when the Petitioner filed a notice of intent to file a petition. Thus, this court concluded, because Spisak had filed this Notice of Intent on December 15, 1995, (Doc. No. 1), the case was "pending" at the time of the AEDPA's enactment, and, therefore, the AEDPA was inapplicable.

In the same Order, the court determined that Section 107 (Chapter 154) of the AEDPA is not applicable to this proceeding because Ohio is not an "opt-in" state as defined by the terms of that Chapter (Doc. No. 72). Specifically, Ohio does not qualify as an "opt-in" state because it does not comply with the provisions of 28 U.S.C. § 2261, which requires a mechanism for appointment, compensation and payment of reasonable litigation expenses of competent

counsel in state post-conviction proceedings brought by an indigent prisoner. 28 U.S.C. § 2261(b).

Since the court issued that Order, however, the Sixth Circuit decided that a habeas corpus case commences with the filing of the petition. *Williams v. Coyle*, 167 F.3d 1036, 1040 (6th Cir. 1999). To determine what constitutes a "pending" habeas case for purposes of applying the AEDP A, the Sixth Circuit first determined that the word must be given its ordinary meaning. *Id.* at 1 038 (citing *Moskal v. United States*, 498 US. 103, 108 (1990)). Noting the similarities between the filing of a habeas petition and the filing of a civil complaint, the court noted that Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

The Sixth Circuit also looked to the language contained in § 2254 to support its finding. Specifically, §2254(e) refers to "a proceeding instituted by an application for a writ of habeas corpus." Moreover, Section 1914(a) of Title 28 provides that the "district court shall require the parties instituting any civil action, suit or proceeding . . . to pay a filing fee of $150, except that on an application for a writ of habeas corpus the filing fee shall be $5." Thus, the statutes associate the commencement of a habeas corpus proceeding with the filing of the application or petition. Consequently, the Sixth Circuit determined that a habeas case "commences" when the petition is filed. Thus, for purposes of applying the AEDPA, a case may be "pending" only after it has been commenced by the filing of the petition. *Id.*

In the instant case, Spisak filed his Petition on April 9, 1997, (Doc. No. 19), almost a year after the AEDPA's effective date. In a previous Order, (Doc. No. 124), the court noted that the Williams decision required the court to amend its previous determination. While the court will utilize the

AEDPA's statutory amendments to 28 U.S.C. § 2254 et seq. as found in Chapter 153, the court's prior determination that Ohio is not an "opt-in" state remains unaltered. Thus, Chapter 154 is inapplicable to this case.

The analysis does not end, however, with the determination that Chapter 153 of the AEDPA is the applicable standard to utilize. The court next must determine what level of deference to give to the Ohio Supreme Court's brief opinion. On April 13, 1988, the Ohio Supreme Court affirmed Spisak's conviction and sentence. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988). After reciting the facts adduced during trial, the Ohio Supreme Court addressed the merits of Spisak's claims. Noting that many of Spisak's claims were "time-worn legal arguments raised in a multiplicity of printed pages," the court addressed Spisak's sixty-four claims in a two-page, summary fashion. *Id.* at 801-02.[6] The Ohio

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[6] Although the court will not reproduce the two pages addressing the claims here, the court notes, for purposes of illustration, the manner in which the Ohio Supreme Court addressed seven of Petitioner's sixty-four claims below:

> In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four, appellant raises arguments which have previously been raised and rejected in the following cases: *State v. Jenkins*, (1984), 15 Ohio St. 3d 164, 15 OBR 311, 473 N.E.2d 264, certiorari denied (1985), 472 U.S. 1032, 105 S. Ct. 3514, 87 L.Ed.2d 643; *Maurer, supra*; *State v. Buell*, (1986), 22 Ohio St.3d 124,22 OBR 203, 489 N.E.2d 795, *certiorari denied*, (1986), 479 U.S. 871,107 S. Ct. 240, 93 L.Ed.2d 165; *State v. Williams* (1986), 23 Ohio St.3d 16, 23 OBR 13,490 N.E.2d 906, certiorari denied (1987),480 U.S. 923, 107 S. Ct. 1385,94 L.Ed.2d 699; and *State v. Steffen* (1987), 21 Ohio St. 3d 111,31 OBR 273,509 N.E.2d 383.

Spisak, 521 N.E.2d at 802.

Supreme Court then concluded that none of Spisak's claims had merit. The court went on to re-weigh independently the statutory mitigating factors and aggravating circumstances, concluding that Spisak's death sentence was appropriate. *Id.* at 803-04.

The AEDPA significantly altered the standard of review a habeas court must apply, requiring increased deference to a state court's decision. The relevant statute states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). Recently, the United States Supreme Court interpreted this statute in *Williams v. Taylor*, 529 U.S. 362 (2000). According to Justice O'Connor, a habeas court may grant relief only if "the state court identifies the correct governing legal rule from this Court's cases, but unreasonably applies it to the facts of the particular

state prisoner's case" or if the state court "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* 407. A fragmented Court also determined the "unreasonable application" language to mean something more than merely the state court's incorrect application of federal law. *Id.* at 411. While the *Williams* case was instructive to habeas courts in its interpretation of § 2254(d), it is not of practical guidance in a case such as this where the state court opinion lacks substantial analysis upon which a federal habeas court can analyze the application of law for "reasonableness."

Initially, the court notes that the Ohio Supreme Court opinion, while decidedly brief, was an "adjudication on the merits" pursuant to § 2254(d). Courts deciding habeas cases involving a state court's summary review have determined that a summary review is not "indicative of a cursory or haphazard review of a petitioner's claims." *Wright v. Angelone*, 151 F3d 151, 157 (4th Cir. 1998). Thus, Spisak cannot escape the purview of the AEDPA on this basis.

The Sixth Circuit recently determined in *Harris v. Stovall*, 212 F.3d 940, 943 (6th Cir. 2000), *cert. denied*, 532 U.S. 947 (2001), that when reviewing a summary state court opinion, a habeas court is "obligated to conduct an independent review of the record and applicable law to determine whether the state court decision is contrary to federal law, unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented." In that case, the Michigan Court of Appeals summarily issued an order granting the State's motion to affirm the conviction on appeal. *Id.* The Michigan Supreme Court denied the petitioner leave to appeal the Court of Appeals' decision. *Id.*

After reviewing the standards employed by other circuits for evaluating summary state court opinions, the Sixth Circuit determined that it would conduct an independent review of the petitioner's habeas claims. It went on to note: "[t]hat independent review, however, is not a full, *de novo* review of the claims, but remains deferential because the court cannot grant relief unless the state court's result is not in keeping with the strictures of the AEDPA." *Id.* The court then applied the two-step approach of conducting an independent review then subjecting the state court holding to the "reasonableness" review that the AEDP A mandates.

Thus, if a habeas court determines that a petitioner has not demonstrated a constitutional violation in regard to a particular claim, then it must necessarily determine that a state court decision denying such a claim was not "unreasonable." If it determines that the petitioner's claim has merit and a constitutional violation occurred, then the habeas court must defer to the state court decision unless it was "unreasonable." This court will, thus, subject the claims in Spisak's Petition to an independent review. Thereafter, the court will determine if the state court holding was "reasonable."

IV. EXHAUSTION AND PROCEDURAL DEFAULT

A. Exhaustion

A state prisoner must exhaust his state remedies before bringing his claim in a federal habeas corpus proceeding. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy*, 455 U.S. 509 (1982). A habeas petitioner satisfies the exhaustion requirement when the highest court in the state in which the petitioner has been convicted has had a full and fair opportunity to rule on the claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). If under state law there remains a

remedy that petitioner has not yet pursued, exhaustion has not occurred and the federal habeas court cannot entertain the merits of the claim. *Rust*, 17 F .3d at 160.

B. Procedural Default

The Respondent argues that Spisak is precluded from raising "any claims brought in his post-conviction petition that are separate or different from his claims brought on direct appeal. . . ."[7] Return of Writ at 30. Later in this opinion, the court will address the question of procedural default as to

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[7] The court notes that Respondent failed to assert procedural default as to each individual claim. Petitioner contends that because Respondent made only vague and broad assertions of procedural default without specifically alleging why each claim is defaulted, he has waived the right to assert this defense as to all claims.

In *Trest v. Cain*, 522 U.S. 87 (1997), the Supreme Court addressed the question of whether a court must raise the issue of procedural default *sua sponte* even where the State has failed to assert it as a defense to a petitioner's claims. The Court held that because it is not jurisdictional, "procedural default is normally a 'defense' that the State is 'obligated to raise' and 'preserv[e]' if it is not to 'lose the right to assert the defense thereafter.'" *Id.* at 89 (quoting *Gray v. Netherland*, 518 U.S. 152, 166 (1996)). It therefore concluded that a court reviewing a habeas petition is not required to *sua sponte* address whether a petitioner has procedurally defaulted his claims. In so deciding, the Court explicitly left open the question whether a court *may* raise the issue *sua sponte*, noting that there was disagreement in the lower courts on this matter. *Id.* at 90.

Several years after *Trest*, the Sixth Circuit in *Elzy v. United States*, 205 F.3d 882 (6th Cir. 2000), answered the question left open by the Supreme Court in the affirmative. *Id.* at 886 ("While procedural default is not a jurisdictional bar to review of such a claim, . . . and the Government's failure to raise the default may operate as a forfeiture of its right to defend on that ground, . . . we nonetheless may raise the[] issue *sua sponte*.") (citations omitted). Because Respondent did, in fact, raise the issue of procedural default, albeit in a somewhat vague and conclusory manner, the court here chooses to conduct a sua sponte procedural default analysis.

each individual ground for relief. Here, however, the court sets out the applicable law governing procedural default.

For purposes of comity, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

The Sixth Circuit Court of Appeals set out the analytical framework for determining the defaulted status of a claim. In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), it stated: "(w)hen a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated (four-prong) analysis." *Id.* at 138. Specifically, the Sixth Circuit stated:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule . . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [Fourth, if] the court

> determines that a state procedural rule was not complied with and that rule was an adequate and independent state ground, then the petitioner must demonstrate. . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id. (citations omitted).

Ohio Rule of Appellate Procedure 16(A)(3) requires an appellant to include in his brief a statement of the assignments of error presented for review. In *State v. Perry*, 226 N.E.2d 104 (Ohio 1967), the Ohio Supreme Court ruled that:

> Under the doctrine of res judicata, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on appeal from that judgment.

Id. at 108; *see also State v. Roberts*, 437 N.E.2d 598, 601 (Ohio 1982) (holding policy behind *Perry* bars post-conviction petitioners from raising issues that could have been raised on direct appeal in a collateral proceeding to avoid reversal of conviction based on collateral, rather than constitutional, issues).

V. GROUNDS FOR RELIEF RAISED IN THE PETITION

The Petitioner has raised thirty-three grounds for relief in the Petition. While the court will address each claim,

certain claims will be grouped together as they raise similar legal or factual issues.[8] Spisak raised the following claims for relief in the Petition:

A. Grounds for Relief Related to Petitioner's Plea of Not Guilty by Reason of Insanity

1. Mr. Spisak was denied his right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the Trial Court, in the presence of the jury, excluded and struck from the record expert psychiatric testimony that the Court had previously ruled admissible.

2. When the Trial Court usurped the jury's fact finding function by excluding all expert evidence of insanity, mental disease or defect, it denied the Petitioner his rights to due process, a fair trial and compulsory process for obtaining witnesses in his favor as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

3. Mr. Spisak was denied his right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution when the Trial Court denied the Petitioner the right to testify on his own behalf.

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[8] The claims are grouped similar to the manner that they are presented in the Petition. The court has renumbered the groups as they were misnumbered in the Petition.

4. When, in spite of both expert and lay testimony as to Petitioner's insanity, the Trial Court refused to instruct the Petitioner's jury on the insanity defense, which constituted the Petitioner's sole theory of defense. Mr. Spisak was thereby denied his right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. Grounds for Relief Related to the Mitigation Phase

5. When the Trial Court instructed the jury in the penalty phase of Petitioner's trial on nineteen (19) separate aggravating circumstances to four aggravated murder charges arising out of three homicides, it destroyed the reliability of the sentencing proceedings, in violation of Petitioner's constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

6.When, during his mitigation phase closing argument, Mr. Spisak's counsel repeatedly and emphatically stressed the brutality of the crimes, and scathingly demeaned Petitioner, counsel acted in direct conflict with his duty to loyally represent Petitioner. As a result Petitioner was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

7. When the Trial Court improperly instructed Petitioner Spisak's jury at the penalty phase of

the trial that the jury's recommendation as to sentence had to be unanimous, Petitioner was prejudiced and his right under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

8. When the Trial Court instructed Petitioner Spisak's jury at the penalty phase of the trial that the jury was prohibited from considering mercy or sympathy, Petitioner was prejudiced and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

9. When the Trial Court instructed Petitioner Spisak's jury at the penalty phase of the trial that the jury could consider any factor it desired in determining the appropriate penalty, Petitioner was prejudiced and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

10. Mr. Spisak was denied the effective assistance of counsel during the mitigation phase of his trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

11. When the State presented inflammatory and irrelevant evidence that did not rebut any evidence presented in mitigation, the State upset the delicate balancing system and destroyed the reliability of the sentencing determination. Petitioner was prejudiced and his rights under the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution were violated.

12. When the Prosecutor repeatedly acted improperly in the mitigation phase of the Trial in clear effort to denigrate both the Petitioner, his mitigation that he suffered from a mental disease, and his witnesses, he was denied a fair trial free from prosecutorial misconduct as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

C. Grounds for Relief Relating to Petitioner's Appeals and Post-Conviction Review

13. When Petitioner's original appellate counsel raised only a single and solitary issue in Petitioner's initial appeal, counsel's performance was so seriously deficient that the attorneys were not functioning as counsel. As a result Petitioner was denied the right to the effective assistance of counsel in clear violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

14. When Mr. Spisak's trial counsel and the trial court failed to keep a complete and full transcript of all proceedings occurring in the trial, Petitioner was prejudiced and his rights as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

15. When the Eighth District Court of Appeals refused to permit the Petitioner's counsel to

raise and brief any issues on either the first or second remand from the Ohio Supreme Court, and when the Ohio Supreme Court failed to address any of the issues raised in his appeal, Petitioner was denied the right to the effective assistance of counsel as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

16. When the Ohio Supreme Court failed to provide the level of review constitutionally required in capital cases by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution the Petitioner's rights were violated.

D. Grounds for Relief Relating to Search and Seizure Evidence

17. When evidence which had been illegally gathered from Petitioner's residence and seized was introduced against the Petitioner during his trial Petitioner's rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

18. When evidence which had been illegally gathered and seized was introduced against Petitioner during his trial, Petitioner's rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

19. When evidence which had been illegally gathered and seized was introduced against the Petitioner during his trial, Petitioner's

rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

E. Grounds for Relief Relating to "Other Acts" Evidence

20. When the Trial Court received testimony concerning various firearms that were found among the Petitioner's belongings, and these firearms were unrelated to any of the crimes with which the Petitioner was charged, Petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Evidence Rule 401, 402 and 403 were violated.

21. When the Trial Court received testimony concerning various items that were found among the Petitioner's belongings, and these items were unrelated to any of the crimes with which the Petitioner was charged, Petitioner's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Evidence Rule 401, 402 and 403 were violated.

22. When the Trial Court received testimony concerning various uncharged allegations of violent behavior, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

23. When the Prosecutor's misconduct permeated the record, including relentless attacks upon the Petitioner's character through allegations of 'other acts', Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth

Amendments to the United States Constitution were violated.

24. When the Prosecutor testified without being sworn and allowed a witness to testify without being sworn, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

25. When the Prosecutor testified without being sworn regarding the Petitioner's political beliefs, Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

F. Grounds for Relief Relating to Admission of Exhibits Into Evidence

26. When the Trial Court failed to exclude from the jury's consideration evidence that the Trial Court had already ruled was prejudicial and inflammatory, the Petitioner's right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated.

27. When the Trial Court failed to exclude from the jury's consideration gruesome photographs, both cumulative and prejudicial, lacking in significant probative value, the Petitioner's right to a fair trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated.

G. Grounds for Relief Relating to Fair Trial Issues

28. When Mr. Spisak was impeached with his post-arrest silence, he was denied due process under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

29. When, in the course of voir dire the jury was repeatedly informed by both the Trial Court and the prosecutor that their death penalty verdict was "only" a recommendation to the Trial Court and not at all binding upon the Trial Judge, the Petitioner's constitutional rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution were violated.

30. When the Trial Court, improperly and over defense objection, excluded potential juror Thomas J. Schmitt because of his views about the death penalty, Petitioner was deprived of a fair trial and impartial jury as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

H. Ground for Relief Relating to Bias and Sympathy

31. When witnesses were permitted to testify about the victims and their families solely to arouse the sympathies and emotions of the jury, the Petitioner's right to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated.

I. Ground for Relief Relating to Ineffective Assistance of Counsel

32. Mr. Spisak was denied the effective assistance of counsel during all phases of his trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

J. Ground for Relief Relating to the Constitutionality of Ohio's Death Penalty

33. The statutory provisions governing the Ohio capital punishment scheme suffer from multiple constitutional inadequacies, which render the entire scheme unconstitutional on its face.

VI. GROUNDS FOR RELIEF

A. Grounds for Relief Related to Petitioner's Plea of Not Guilty by Reason of Insanity

1. First and Second Grounds for Relief

In his first and second grounds for relief, Spisak contends that the trial court violated his right to a fair trial and invaded the fact finding function of the jury when it excluded the testimony of Dr. Oscar Markey. Spisak contends the trial court violated his constitutional rights when, after initially permitting Dr. Markey to testify on Spisak's behalf, the court altered its decision and excluded the testimony. The court finds that neither ground is procedurally defaulted. Ground One was raised to the Ohio Supreme Court as Proposition of Law VII. Ground Two also was raised to the Ohio Supreme Court as Proposition of Law V. Consequently, the court will address both claims on their merits.

After Spisak entered a plea of not guilty by reason of insanity, the trial court ordered Spisak to undergo a mental examination pursuant to Ohio Rev. Code § 2945.39 (current version at Ohio Rev. Code § 2945.371(E)). Thereafter, five doctors in the fields of psychiatry and psychology examined Spisak. Four explicitly found that Spisak's mental condition did not support an insanity plea. Dr. Markey, however, was ambivalent in his report and the defense sought to have him testify at trial. The trial court heard extensive in limine testimony from Dr. Markey in which he asserted that although Spisak did not suffer from a mental disease or defect, he did have a personality disorder and that he was unable to control his actions during the commission of the crimes. While Dr. Markey at times wavered as to his conclusion regarding Spisak's sanity at the times the crimes were committed, the court determined there was sufficient evidence to permit him to testify before the jury.

Upon cross-examination during trial, however, Dr. Markey's testimony, taken as a whole, was not ambivalent. He clearly indicated the defendant was not insane at the time of the commission of the crimes. The prosecutor questioned Dr. Markey:

> Q: You said that he was unable to control his impulse to assault?
>
> A: That's right.
>
> Q: And what you are saying now, that is not the same thing as irresistible impulse?
>
> A: That's right.
>
> Q: But you are saying he had the ability to resist that impulse if he thought it was in his best interest to do so?

A: That's right. That's part of the personality disorder. That's right.

***

Q: My question, he was able to control his impulse to assault to the ability that you just said? He made a conscious decision at the time to shoot and he could just as easily have made a conscious decision not to shoot if it was in his mind to do that?

A: You are indicating that he was calculating.

Q: Well, that's what you are saying, too, isn't it?

A: He could at times control it; at other times he would decide that he didn't need to control it.

Q: Right. Are you agreeing with that?

A: Yes.

Q: Okay. So he was able to conform his conduct to the requirements of the law, if that's what he wanted to do? He just chose not to do it?

A: There must have been times and there were these times when that was true.

Q: And there were times that he chose to control it, there were times that he chose not to conform his conduct to the requirements of the law?

A: That appears to be the case.

Q: And that was his decision that he made?

A: Yes.

***

Q: I'm indicating to you, doctor, and asking for your opinion is that he made a conscious decision to shoot, or not to shoot on each case that we have in this indictment?

A: Yes, he was not in a frenzy where he didn't know what he was doing. He had a conception of what he was doing and he realized that he could have—

Q: He could have refrained from pulling the trigger on any of those five [occasions], had he chosen to do so?

A: Yes.

(Tr. 1992-1995). Although defense counsel tried to rehabilitate Dr. Markey's testimony, it only proved further damaging as he stated on re-direct:

> The questions have been asked me before indicate that in every instance in which he did assault, whether he killed or not, he was calculating and knew whether or not he could go ahead, in his view, he was positive in doing it, that he had enough conscious control over it to do it at a time when it would be to his advantage. . . .

(Tr. 1997). The following day, outside the presence of the jury, the court concluded that Dr. Markey's testimony did not meet the "minimal standard" required for the submission of the testimony to the jury and subsequently directed the jury to disregard it. (Tr. 20 17). Spisak argues that the trial court's decision to exclude Dr. Markey's testimony violated his right

to a fair trial and unconstitutionally invaded the role of the jury as factfinder.

The Sixth Circuit addressed an issue similar to that raised herein in *Matlock v. Rose*, 731 F .2d 1236 (6th Cir. 1984). In that case, the petitioner claimed the trial court improperly excluded the testimony of a psychologist who testified that the petitioner knew right from wrong on the intellectual level of an eight or nine year old. The Sixth Circuit disagreed. First, the court noted that "[e]rrors of application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus actions." *Matlock*, 731 F.2d at 1242 (citing *Bell v. Arn*, 536 F.2d 123 (6th Cir. 1976); *Burks v. Egeler*, 512 F.2d 221 (6th Cir. 1975), *cert. denied*, 423 U.S. 937 (1975)). Hence, a habeas court can grant relief only when the error effectively denies the defendant a fundamentally fair trial. *Id.* (citing *Maglaya v. Buchkoe*, 515 F.2d 265 (6th Cir. 1975), *cert. denied*, 423 U.S. 931 (1975); *Gemmel v. Buchkoe*, 358 F.2d 338 (6th Cir. 1966), *cert. denied*, 385 U.S. 962 (1966); *Handley v. Pitts*, 491 F. Supp. 597 (E.D. Tenn. 1978); *aff'd*, 623 F.2d 12 (6th Cir. 1980)).

The Sixth Circuit went on to examine Tennessee insanity law and noted that the excluded testimony would only have undercut the defense because the psychologist could not testify that the defendant did not know the wrongfulness of his conduct as the law required. Concluding that the excluded testimony would have, "[a]t best. . . shown that Matlock was retarded with some brain damage," the court affirmed the district court's denial of the writ. *Id.* at 1243.

Utilizing the guidance that *Matlock* provides, the court will analyze Spisak's claim under Ohio insanity law in light of the restrictions placed on a reviewing habeas court. Pursuant to the Ohio Revised Code, "a person is 'not guilty

by reason of insanity' relative to a charge of an offense only if he proves. . . that at the time of the commission of the offense, he did not know, as a result of a severe mental disease or defect, the wrongfulness of his acts." Ohio Rev. Code § 2901.01(N) (current version at Ohio Rev. Code § 2901.01(A)(14)); *State v. Staten*, 267 N.E.2d 122, 124 (Ohio 1971). Although a person is no longer presumed sane once he or she pleads not guilty by reason of insanity, Ohio Rev. Code § 2943.03, a defendant has the burden of proving this affirmative defense by a preponderance of evidence. Ohio Rev. Code § 2901.05. "Proof that a person's reason, at the time of the commission of an offense, was so impaired that the person did not have the ability to refrain from doing the person's act or acts, does not constitute a defense." Ohio Rev. Code § 2945.391.

In addition to the statutory law cited above, the court finds *State v. Dotson*, No. 43629, 1982 WL 2330 (Ohio Ct. App. Feb. 4, 1982), instructive. In that case, the defendant pleaded not guilty by reason of insanity for shooting a car salesman who sold him a car in need of many repairs. During trial, three expert witnesses found that the defendant suffered from paranoid schizophrenia but were unable to conclude that the defendant was legally insane during the murder. *Id.* at *3. Thus, the trial judge found "that the defense did not sustain the burden of proving insanity by a preponderance of the evidence" and excluded all such evidence from the jury. *Id.* (internal quotation marks omitted).

On appeal in that case, the Eighth District Court of Appeals determined that the trial judge acted properly. Contrary to Dotson's assertions that the trial court had invaded the fact finding function of the jury, the Eighth District held that "while issues of credibility and weight remain reserved for jury determination, issues pertaining to admissibility are vested in the discretion of the trial court."

Id. at *4 (citations omitted). Therefore, the court determined that the trial court properly had excluded such evidence as irrelevant pursuant to Ohio Rule of Evidence 104. *Id.* at *5.

The court finds that Spisak's constitutional right to a fair trial was not violated when the trial court excluded Dr. Markey's testimony. Similar to the *Dotson* experts, Dr. Markey did not testify that Spisak was suffering from a mental disease or defect which caused him not to understand the wrongfulness of his acts at the time he committed the murders. Because Dr. Markey stated on cross-examination that Spisak could control his actions on each occasion, the court concurs with the Eighth District Court of Appeals, which determined: "It is difficult, if not impossible, to see how Markey's testimony would, in any fashion, have assisted the jury in reaching a conclusion on the legal insanity of [Spisak]. Primarily, the testimony reinforced the argument that the appellant was sane at the time of the acts." *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992, at *6 (Ohio Ct. App. July 19, 1984). Accordingly, the court finds that the Ohio Supreme Court's denial of this claim was not unreasonable and Spisak's first and second grounds for relief are not well-taken.

2. Fourth Ground for Relief

Also related to his insanity defense, Spisak asserts in his fourth ground for relief that he was denied the right to a fair trial when the trial court refused to instruct the jury on the insanity defense. After excluding Dr. Markey's testimony, the defense counsel called Spisak's sister and his ex-wife. Both testified that Spisak, on occasion, behaved strangely, particularly since his involvement in a near-fatal car accident. Spisak's sister noted that when he spoke of the murders he had "a glazed look" in his eyes (Tr. 2030). Additionally, Spisak's ex-wife testified that after the car accident he became more involved with Nazi activity and

began dressing as a woman (Tr. 2075-76). Because of this testimony, defense counsel timely objected to the court's decision to exclude the insanity charge, asserting that the defense had supplied sufficient lay witness testimony to warrant it (Tr. 2400). Petitioner now reasserts that argument.

The court finds that this claim is not procedurally defaulted. Spisak raised this claim to the Ohio Supreme Court as Proposition of Law IV. Accordingly, the court will address this claim on the merits.

Because jury instructions errors typically are matters of state law, the standard for demonstrating that a jury instruction caused constitutional error in a habeas proceeding "is even greater than the showing required to establish plain error on direct appeal." *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). "The question in such a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned." *Id.* (citations and internal quotation marks omitted). Moreover, a habeas petitioner's "burden is especially heavy [when] no [affirmatively] erroneous instruction was given . . . . An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.* at 155.

In this claim, Spisak fails to carry this burden. Although Ohio courts long have held that a defendant's insanity is a factual question for the jury, the defendant must meet some minimal threshold to justify consideration by the jury:

> 'Under a plea of not guilty by reason of insanity, the burden of establishing such a defense rests upon the defendant by a preponderance of the evidence. When from

> the evidence reasonable minds may reach different conclusions upon the question of insanity, such question of fact is for the jury. If, however, after giving the evidence the most favorable interpretations in favor of the defendant, reasonable minds can come to but one conclusion and that conclusion [is] adverse to [the] defendant, it is the court's duty to rule on the issue as a matter of law.' *State v. Ross*, 108 N.E.2d 77,86 (Ohio Ct. App. 1952), appeal dismissed, 108 N.E.2d 282 (Ohio 1952).

State v. Gaines, 318 N.E.2d 857, 864 (Ohio Ct. App. 1974).

Ohio courts have determined that a defendant need not provide expert testimony to meet his or her burden of proof to send the insanity issue to the jury. *State v. Reynolds*, 550 N.E.2d 490, 495 (Ohio Ct. App. 1988). A review of Ohio decisions in which lay testimony established a defendant's burden of proof, however, reveals that such testimony involved much more significant evidence of the defendant's mental illness than that presented by Spisak's sister and ex-wife. For example, in Reynolds, evidence had been submitted that defendant suffered from a severe mental disorder that required constant use of anti-psychotic medication. *Id.* at 496. The defendant's sister testified that the defendant had been off his medication for three days prior to committing the offense. *Id.*

Moreover, Spisak's reliance on *United States v. Smith*, 437 F.2d 538 (6th Cir. 1970), is misplaced and only serves to undercut his assertion that lay testimony is sufficient to establish insanity. In *Smith*, the United States

Commissioner[9] in Cincinnati, before whom the defendant appeared several times, and a Federal Bureau of Investigations officer, who arrested defendant, testified in rebuttal to a defense psychiatrist that defendant "did not appear particularly abnormal." *Id.* at 541. The Sixth Circuit held the federal officials' testimony was of little probative value and should have been excluded because "[n]othing in their testimony even remotely suggested a basis for making a judgment whether appellant was able to conform his conduct to the requirements of the law." *Id.* Thus, Smith stands for the proposition that only lay testimony that tends to demonstrate a defendant's sanity at the time the crimes were committed is probative and therefore admissible.

Just as in *Smith*, Spisak's sister and ex-wife's testimony did nothing more than demonstrate Spisak occasionally behaved strangely. Their testimony did not support the conclusion that he was insane at the times the crimes were committed, i.e., that he suffered from a mental disease which caused him not to understand the wrongfulness of his acts. Consequently, the trial court properly determined that Spisak did not, as a matter of law, produce evidence sufficient to require a jury instruction on the insanity defense. Because the trial court's ruling does not violate the bounds of due process, the court finds the Ohio Supreme Court's decision was not unreasonable. Accordingly, Spisak's fourth ground for relief is not well-taken.

3. Third Ground for Relief

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[9] The title "United States Commissioner" referred to in the text is the position which is currently held by United States Magistrates. The Magistrate System replaced the Commissioner system with the passage of the Federal Magistrate Act of 1979. L. Ralph Mecham, *A Guide to the Legislative History of the Federal Magistrate Judges System* 4-8 (1995).

In Spisak's Third Ground for Relief, he claims that the trial court impermissibly infringed on his right to testify on his own behalf when it sustained numerous prosecutorial objections regarding his religious beliefs. Trial counsel based their insanity defense on assertions that Spisak felt God had guided him to kill and permitted him to escape from the murder scene undetected. Because the prosecution objected to, and the trial court sustained, some questions regarding Spisak's religious beliefs in relation to the murders, Spisak contends he was effectively denied the right to testify on his own behalf.

The court finds that this ground for relief is not procedurally defaulted as it was raised on direct appeal to the Ohio Supreme Court as Proposition of Law VII. The court, therefore, will address the merits of the claim.

"The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975)). "The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony." *Id.*

Spisak cannot successfully claim that he was denied this testimonial right. As Respondent notes, Spisak's testimony spans over five hundred (500) pages of trial transcript. Moreover, Spisak was permitted to testify on numerous occasions regarding his religious beliefs. (Tr. 1362-63, 1396, 1401-02, 1405, 1429-30, 1449, 1453, 1482). Most significant was a court ruling that took place during sidebar. During direct examination of Spisak, defense counsel was attempting to demonstrate the relationship between Spisak's beliefs regarding Naziism and his religious

beliefs (Tr. 144). The prosecutor objected to this line of questioning and, thereafter, the following conversation took place:

> The Court: Mr. Nugent.
>
> Mr. Nugent: I have objected to the last question on the basis that I don't believe that it is relevant to the inquiry.
>
> ***
>
> The objection - another thing, my impression of this testimony is that the defendant is explaining to this jury that not only is he guilty of the crimes charged, but that he is explaining to them why he is guilty and everything that surrounds it. It is a complete admission of his guilt. My objection is not only to the relevancy, but it is to make this record clear, I'm aware of what's going on, and if the defense has a reason, or motivation, that he wants to get all these admissions in front of them, that's their tactic, as long as the record is aware that's their purpose.
>
> The Court: Mr. Shaughnessy.
>
> Mr. Shaughnessy: Your honor, rest assured that this examination is not a Kamikaze attempt to later claim foul to the Appellate proceedings. The record on Tuesday is replete, and we have the transcript, about the cross to bear, that God directed each of his operations. Unlike (the prosecutor), I think I share the view of almost everyone who heard and read that, that this guy is an absolute certified lunatic.

> As far as we know, God didn't send him to do these things. His relationship with God and God giving him the cross, the job as he foresaw he, he explained the other day, God was right there on his right shoulder, so to speak, or he was on God's leash, if you will, directed certainly by God.
>
> Now, we went into that the other day. He explained the thrust of the – the thrust of the State's case, and I might say this is in the evidence that has been admitted, and that should be in the record. There is just literally tons and tons of things that have to do with God, the Nazi Part, the White People's Party, the relationship with Jesus Christ and certainly we have got into that the other day as we still have three or four more – two more killings to explore. And we would like to –
>
> The Court: I will overrule the objection.

(Tr. 1445-48.)

Thereafter, the court permitted Spisak to testify about the relationship between his Nazi beliefs and its affiliation with Jesus Christ and the Bible. Because, contrary to Petitioner's assertions, the trial court permitted substantial testimony regarding the religious forces he felt guided him towards murder, Spisak was neither denied the right to testify on his own behalf nor was he denied the right to present his insanity defense. Accordingly, the Ohio Supreme Court's determination regarding this claim was reasonable. Spisak's third ground for relief is without merit.

B. Grounds for Relief Related to the Mitigation Phase

1. Faulty Jury Instruction Claims

In his Fifth, Seventh, Eighth and Ninth Grounds for Relief, Spisak maintains that the trial court erred when charging the jury on several occasions during the mitigation phase of trial. The court will examine each claim individually, mindful that an incorrect jury instruction does not warrant federal habeas corpus relief if it was merely undesirable, erroneous or universally condemned. Instead, the instruction must violate a constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Upon review, a court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence. *Boyd v. California*, 494 U.S. 370, 380 (1990). The impropriety of the instruction must be considered in the context of the instructions as a whole and the trial record. *Id.* Rarely will an erroneous jury instruction justify reversal in a criminal case when no objection was made during trial. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977). The court now turns to Spisak's individual claims for relief.

a. Fifth Ground for Relief

In his Fifth Ground for Relief, Spisak maintains the trial court erred when it instructed the jury on nineteen separate aggravating circumstances regarding four aggravated murder charges originating from three murders. Spisak asserts that the multitude of aggravating circumstances supplied by the trial court upset the "delicate balance" a jury must review during the weighing of aggravating circumstances and mitigating factors at the penalty phase of the trial, causing the jury to favor a death sentence.

Initially, the Court notes this claim is not procedurally defaulted because Spisak raised this claim to the Ohio Supreme Court as Proposition of Law I. Accordingly, the court will address the claim on the merits. Before releasing

the jury to deliberate during the mitigation phase of trial, the court charged the jury on the definition of an aggravating circumstance:

> Now, aggravating circumstance. What is an aggravating circumstance?
>
> In this case the aggravating circumstances are the specifications upon which you returned guilty verdicts in four separate counts of the indictment.

(Tr. 2967). Thereafter, the court repeated all nineteen specifications.[10]

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[10] The specifications, as taken from the trial transcript, were as follows:

> "One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed Brian Warford.
>
> "Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed Timothy Sheehan."
>
> "Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender attempted to kill Coletta Dartt.
>
> "Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of the course of conduct in which the offender attempted to kill John Hardaway."
>
> In count five, aggravated murder, the murder of Timothy Sheehan while committing or attempting to commit or while fleeing immediately after committing

or attempting to commit aggravated robbery, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed aggravated murder and that the victim of the aggravated murder was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"Six, that the defendant committed aggravated murder and that the offense was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit an aggravated robbery, and that the offender was the principal offender in the commission of the aggravated murder."

In count six, aggravated murder, the murder of Timothy Sheehan, with prior calculation and design, they are as follows:

"That the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"That the defendant committed the offense of aggravated murder and the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed the offense of aggravated murder and that the victim of the aggravated murder presented above was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

In count eight, aggravated murder, the murder of Brian Warford with prior calculation and design, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely

On appeal, the Eighth District Court of Appeals determined that Spisak was improperly convicted of two counts of aggravated murder for the death of Timothy Sheehan. The court stated:

> The appellant was indicted on four counts of aggravated murder for the murders of three people. Two counts of aggravated murder, the fifth and sixth counts of the indictment, were for the murder of one individual, Timothy Sheehan. The appellant was subsequently convicted for and sentenced on all four counts of aggravated murder.
>
> R.C. 2941.25(A) provides:
>
> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

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killed Brian Warford and also purposely killed Timothy Sheehan.

"Three, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely attempted to kill Coletta Dartt.

"Four, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely attempted to kill John Hardaway."

(Tr. 2967-72).

> Accordingly, while it was proper for the appellant to have been indicted on two separate counts of aggravated murder for the murder of Timothy Sheehan, he could only be convicted on one of those counts.

State v. Spisak, Nos. 47458, 47459, slip op., 1984 WL 13992, at *7 (Ohio Ct. App. July 19,1984). Thus, the trial court should not have charged the jury on one set of specifications relating to Sheehan's death.

Moreover, the Ohio Supreme Court noted that the trial court incorrectly failed to merge the specifications. That court held that each aggravated murder count should have contained only one specification because they arose from one single course of conduct. *State v. Spisak*, 521 N .E.2d 800, 803 (Ohio 1988). Finally, Spisak alleges that the specification that he killed Sheehan to escape apprehension or punishment for the murder of Rickerson should also merge because it must be construed as a single course of conduct flowing from the Rickerson murder. Spisak does not, however, provide statutory support for such a conclusion.

Thus, according to Spisak, the trial court should have read only three specifications to the jury:[11] (1) that the defendant committed the offense of aggravated murder against Horace Rickerson that was part of a course of conduct to kill or attempt to kill two or more persons; (2) that the defendant committed the offense of aggravated murder against Timothy Sheehan that was part of a course of conduct to kill or attempt to kill two or more persons; and, (3) that the defendant committed the offense of aggravated murder against Brian Warford that was part of a course of conduct to

[11] Spisak does not elaborate on why the trial court should not have instructed the jury on the specification that Timothy Sheehan was killed during the commission of aggravated robbery.

kill or attempt to kill two or more persons. Petitioner asserts this failure to "merge" the specifications pursuant to state law violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights to the United States Constitution.

Although no United States Supreme Court case is directly on point, *Clemmons v. Mississippi*, 494 U.S. 738 (1990), offers some guidance. In that case, the jury found that the state established two statutory aggravating circumstances and sentenced the petitioner to death. *Id.* at 742. The Mississippi Supreme Court later invalidated one of the aggravating circumstances as unconstitutionally vague but upheld the death sentence because the appellate court re-weighed the sentencing decision without the invalidated aggravating factor and found it appropriate. *Id.* at 743. The United States Supreme Court held that a death sentence could be upheld on appeal even when the jury had considered an invalid or improperly defined aggravating factor. The court determined:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one or two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

Id. at 745 (citations omitted). The Court remanded the case, however, because the Mississippi Supreme Court did not

adequately explain its harmless error review after excluding the invalidated aggravating circumstance. *Id.* at 751.

The Court revisited the issue of vague aggravating circumstances in *Stringer v. Black*, 503 U.S. 222 (1992). In *Stringer*, the Court further clarified the state appellate re-weighing process necessary to uphold a death sentence resulting from a constitutionally impermissible aggravating circumstance. First, the Court divided states into "weighing" states or "finding" states. In the first category, a state's capital sentencing process requires the jury to find at least one aggravating circumstance, then weigh that evidence against any mitigating circumstances. *Id.* at 229. In "finding" states, however, a jury must find the existence of one aggravating circumstance before considering the death penalty but the aggravating circumstances do not have a specific function in the jury's decision to impose the death penalty. *Id.*

The Court determined appellate review in a "weighing" state would require closer scrutiny than a "finding" state. In weighing states, the Court opined, ". . . for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor." *Id.* at 230. Moreover, the Court cautioned appellate courts to subject a death sentence to even closer scrutiny when the trial court utilized a vague or imprecise factor. In those instances, a reviewing court must, ". . . at the very least [conduct a] constitutional harmless-error analysis or re-weighing in the state judicial system." *Id.* at 237.

Because the degree of a reviewing court's scrutiny depends heavily upon the type of state in which a petitioner was convicted, the court first must determine whether Ohio is a "weighing" state or a "finding" state. A brief review of the

Ohio Revised Code reveals it is the former. The Revised Code provides:

> (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt. . . the court, trial jury, or panel of three judges **shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following [mitigating] factors**

Ohio Rev. Code § 2929.04(B) (emphasis supplied).

After concluding that Ohio is a weighing state, the court must next ascertain whether the Ohio Supreme Court sufficiently re-weighed the aggravating circumstances on review. The court finds that the Ohio Supreme Court did sufficiently articulate its re-weighing process. After concluding that it "independently determined that the remaining aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt," *State v. Spisak*, 521 N.E.2d 800, 803 (Ohio 1988), the court went on to analyze the mitigation presented in light of the aggravating circumstances:

> Of the mitigating factors specified in R.C. 2929.04(B) appellant relied solely on his allegation that he lacked, due to mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses. R.C. 2929.04(B)(3).

> Although appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.
>
> Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offenses. Nothing in the nature and circumstances of these deliberate murders tempers the gravity of the offenses. We concur with the jury and lower courts that the balance of these factors lies heavily, and beyond a reasonable doubt, on the side of the aggravating circumstances of which appellant was convicted.

Id. at 803-04.

Despite the Ohio Supreme Court's re-weighing after merging the aggravating circumstances, Petitioner contends that *State v. Davis*, 528 N.E.2d 925 (Ohio 1988), *cert. denied*, 488 U.S. 1034 (1989), mandates this court grant him relief. *Davis*, however, is easily distinguishable. In *Davis*, the Ohio Supreme Court vacated the appellant's death sentence because the three-judge panel had improperly made "prior calculation and design" an aggravating circumstance

although it is not listed as such in the Ohio Revised Code. *Id.* at 935. Although the Ohio Court of Appeals attempted to "cure" this defect by conducting an independent re-weighing, the Ohio Supreme Court rejected "independent review as a cure in this particular action because [it could] not know if the result of the weighing process by the three-judge panel would have been different had the impermissible aggravating circumstances not been present." *Id.* at 372.

Ohio courts have limited the scope of the Davis holding to its facts. For example, in *State v. Green*, 609 N.E.2d 1253, 1260 (Ohio 1993), a three-judge panel considered the "nature and circumstances" of a capital murder but did not indicate specifically that it used those facts to comprise an aggravating circumstance as did the Davis trial court. The Ohio Supreme Court, inferring that the panel considered the "nature and circumstances" evidence in a proper manner, held that ". . . this court's independent assessment of the sentence would cure any deficiency in the trial panel's sentencing decision." *Id.* (citing *Clemmons v. Mississippi*, 494 U.S. 738 (1990)).

Both *Clemmons* and *Stringer* dealt with a jury's consideration of vague or improper aggravating circumstances. In the case, however, all nineteen aggravating circumstances were properly delineated before the jury. Spisak does not complain about the content of the questions given to the jury, but rather of the cumulative effect of otherwise constitutionally sound aggravating circumstances. The court finds this error less egregious than pem1Itting a jury to consider an aggravating factor that exceeds constitutional bounds.

Moreover, unlike the *Davis* appellate court, in the instant case, the Ohio Supreme Court articulated its re-weighing process upon merging the aggravating circumstances. This court is not left to speculate what the

Ohio Supreme Court would have done in its re-weighing once the aggravating circumstances were merged. Finally, if as the Supreme Court has determined, re-weighing can cure a defect produced when a jury considers an unconstitutional aggravating circumstance, then, *a fortiori*, a court can cure problems associated with the cumulative effect of constitutionally permissible aggravating circumstances. Consequently, the Ohio Supreme Court cured any defect occurring from the jury's consideration of the nineteen specifications.

Out of an abundance of caution, the court will, nevertheless, subject the trial court's failure to merge the specifications to a harmless error analysis. The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether "the error had [a] substantial and injurious effect or influence in detenl1ining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted). When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the court must conclude that the error affected the jury's verdict. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

Subjecting the trial court's failure to merge the specifications to the harmless error test, the court finds this error harmless beyond a reasonable doubt. Given the facts upon which the aggravating circumstances were predicated - the nature and number of crimes Petitioner committed - the court finds the jury's verdict would not have been affected if the specification merger had occurred. The Ohio Supreme Court's decision to deny this claim was not unreasonable. Thus, Petitioner's Fifth Ground for Relief is not well-taken.

b. Seventh Ground for Relief

Spisak next asserts that the trial court erred because the it improperly instructed the jury that its sentencing recommendation had to be unanimous, yet failed to explain to the jury what action it should take in the event that it failed to reach unanimity. Spisak also claims that the verdict forms, requiring twelve signatures, i.e., unanimous agreement as to the verdict, prejudiced his proceeding. Instead, Spisak alleges, the trial court should have instructed the jury that if they were unable to unanimously agree to death, they must impose a life sentence.

The court finds that Spisak has not defaulted this claim because he raised it as the LIV (54th) Proposition of Law to the Ohio Supreme Court. The court now addresses the claim on its merits.

At the conclusion of the mitigation phase, the trial court instructed the jury in regard to sentencing as follows:

> If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighs the mitigating factors, then you must return that finding to the Court.
>
> I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr. A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you

> find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

(Tr. 2974-75). The trial court also charged the jury regarding the verdict forms, in pertinent part, as follows:

> Now, ladies and gentlemen, I may as well say something about the verdict form right now. There are two sets of verdict forms, one, "We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstance which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.
>
> "We the jury recommend that the sentence of death be imposed and that the defendant Frank G. Spisak, Jr." - there is a spot for twelve signatures. All twelve of you will sign it if that is your verdict in this case.
>
> There are four separate verdict forms for counts five, six and I believe it is eight. Now, there is also a set of verdict forms, same count numbers, read as follows:
>
> "We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G.

> Spisak, Jr., was found guilty of COllll1itting are not sufficient to outweigh the mitigating factors present in this case. "We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving" – there is an asterisk for a spot on the verdict form for you to fill in either 20 or 30 years of imprisonment. And again, all twelve of you must sign whatever verdict it is you arrive at must be signed in ink.

(Tr. 2975-76). Spisak claims both instructions are unconstitutional because the jury was left unenlightened about the consequences of a jury deadlock. He speculates that this failure to inform may have lead some jurors to believe he possibly could escape a sentence without juror unanimity, perhaps leading a jury towards deciding for a death sentence rather than permit him to escape punishment altogether.

Spisak's assertions have been rejected by the United States Supreme Court in *Jones v. United States*, 527 U.S. 373 (1999). In *Jones*, the Court held that the Eighth Amendment requirement against "cruel and unusual punishment" does not require that a jury be instructed on the consequences of deadlock. *Id.* at 383. In that case, Jones had requested that the trial court charge the jury that, "if the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release . . .." *Id.* at 379. The trial court refused Jones's request and the jury unanimously recommended that he be sentenced to death. Jones argued that the trial court's failure to charge the jury on his proposed instruction violated his Eighth Amendment rights.

The Supreme Court disagreed. It first noted that "the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that the jury is unable to fulfill its role - when the deliberations break down and the jury is unable to produce a unanimous sentencing recommendation." *Id.* at 382. While the Court noted that the Eighth Amendment requires that a death sentence not be imposed arbitrarily, it stated that the government in a capital case has a "'strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" *Id.* (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)). The Court concluded that Jones's proposed instruction would thwart this interest. *See id.* at n.5 (noting that it has thus approved the use of a supplemental charge to encourage a deadlocked jury, even a capital sentencing jury, to engage in further deliberations) (citing *Allen v. United States*, 164 U.S. 154 (1896), *Lowenfeld*, 484 U.S. 231). Accordingly, the Court held that while a jury cannot be "affirmatively misled about its role in the sentencing process," the Eighth Amendment "does not require that the jury be instructed as to the consequences of their failure to agree." *Id.* at 381-82.

Jones is fatal to Spisak's claim in that it settled the question of whether a jury must be informed of the consequences of deadlock in the negative. Moreover, Spisak's assertion that a deadlocked jury would choose death, a more severe fonll of punishment, rather than life imprisonment, is based on pure speculation. Finally, Spisak cannot assert that the jury in his case was affirmatively misled about its role in the sentencing phase of his trial. Consequently, Spisak's seventh ground for relief is without merit.

Before moving to Spisak's next claim, the court feels compelled to address another issue related to the sentencing

instruction given by the trial court. Though he did not challenge it on this basis, it is arguable that the instruction would be susceptible of a constitutional attack on the ground that it required the jury to first unanimously reject death, a so-called "acquittal first" instruction, before considering a life sentence. The Sixth Circuit has recently held that such an instruction is unconstitutional. *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003). Specifically, the Davis court held that an instruction requiring that a capital jury "must first unanimously reject the death penalty before it can consider a life sentence. . . precludes the individual juror from giving effect to mitigating evidence and runs afoul of *Mills [v. Maryland*, 486 U.S. 367 (1988)]." *Id.* at 689.[12] Consequently, the court conditionally granted a writ of habeas corpus as to the petitioner's sentence. *Id.* at 691.

In this case, it is evident that the challenge Spisak raises with respect to the instruction given in his case relates only to the trial court's failure to charge the jury on the consequences of its failure to unanimously reach a verdict. He has not attacked the instruction as being constitutionally infirm for the reasons addressed by *Davis*. In fact, Spisak's briefs on the seventh claim do not even quote the language in the jury instruction that would relate to an "acquittal-first" instruction claim. See Traverse at 89. Even more importantly, Spisak did not cite in either his Petition or his Traverse either of the Supreme Court cases on which *Davis* was decided, *Mills* and *McKoy v. North Carolina*, 494 U.S. 433 (1990), both of which were decided long before Spisak filed his

[12] The jury instruction given in *Davis* was similar in pertinent respects to the one given to Spisak's jury.

Petition. Therefore, the court declines to address whether Spisak's sentence was unconstitutional in light of *Davis*.[13]

c. Eighth Ground for Relief

In Spisak's Eighth Ground for Relief, he claims that the trial court improperly admonished the jury not to consider sympathy or prejudice when formulating its sentencing decision. Consequently, Spisak argues, the jury could show no mercy for him. Spisak raised this claim as his LV (55th) Proposition of Law to the Ohio Supreme Court. As such, the court will consider the merits of the claim.

During trial, the court cautioned the jury:

> Now, you must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings, and to render a verdict accordingly.
>
> In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

(Tr. 2976-77). Spisak maintains that the court's proscription against considering sympathy or prejudice prevented the jury

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[13] Moreover, this issue is the subject of some discord in the Sixth Circuit. *Compare Davis, supra,* with *Roe v. Baker*, 316 F.3d 557, 564 (6th Cir 2002) (holding that instruction similar to that given in *Davis* did not violate *Mills*), *Henderson v. Collins*, 262 F.3d 615, 621-22 (6th Cir. 2001) (same), *Scott v. Mitchell*, 209 F.3d 854,875-6 (6th Cir. 2000) (same), and *Coe v. Bell*, 161 F.3d 320, 338 (6th Cir. 1998) (same).

from forming an individualized sentencing decision or basing that decision on mercy for the defendant.

A death-sentenced defendant made a similar argument in *California v. Brown*, 479 U.S. 538 (I987), asserting that an instruction preventing the jury from being swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was unconstitutional. *Id.* at 542. The Supreme Court rejected this argument, holding that "[e]ven a juror who insisted on focusing on [the phrase 'mere sympathy'] in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* Spisak cites *Brown* in his Traverse, attempting to distinguish it by noting, unlike the "catalog of the kind of factors that could improperly influence a jury's decision to vote for or against the death penalty" presented in the Brown instruction, Spisak's jury was told not to be influenced by a mere two factors; sympathy or prejudice. Traverse at 91 (quoting *Brown*, at 543)

The court disagrees with both Spisak's legal interpretation of *Brown* and the factual assessment of the trial court's instruction. First, *Brown* upheld the constitutionality of the jury instruction based not on the quantity of factors the jury was told to disregard, but on how, taken as a whole, a "reasonable juror" would interpret the instruction. *Id.* at 542-43. The Court concluded that when read in context, "a rational juror could hardly hear this instruction without concluding that it was meant to confine the jury's deliberations to considerations arising from the evidence presented, both aggravating and mitigating." *Id.* at 543.

Moreover, according to Spisak's interpretation of *Brown*, his claim must fail. Spisak relies on only a part of the instruction given by the trial court. Although the trial court

did initially instruct the jury not to be influenced by sympathy and prejudice, the court went on, as noted above, to admonish the jury to consider all evidence with "intelligence and impartiality" and without "bias, sympathy or prejudice." Using this "catalog" of items that should and should not influence the jury served to marginalize the word "sympathy," placing it in its proper context. The Ohio Supreme Court's decision to deny this claim was reasonable. Accordingly, Spisak's eighth ground for relief is not well-taken.

d. Ninth Ground for Relief

In Spisak's Ninth Ground for Relief, he claims that the trial court improperly instructed the jury that it might consider any and all evidence in determining whether an aggravated circumstance existed. The court finds this claim is not procedurally defaulted as Spisak raised this claim as his VII (53rd) Proposition of Law to the Ohio Supreme Court. Thus, the court will address the merits of the claim.

At the close of the mitigation phase, the trial court instructed the jury as follows:

> Mitigating factors, what then are mitigating factors? Mitigating factors are those which, while not excusing or justifying the offense, or offenses, may, in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment. These mitigating factors include, but are not limited to, the history, character and background of the offender and the following factors:
>
> One, at the time of committing the offense the defendant because of mental disease or defect, lacked substantial capacity to appreciate the

> criminality of his conduct or to conform his conduct to the requirements of the law. Two, any other factors, that are relevant to the issue of whether the defendant should be sentenced to death.

(Tr. 2972-73) (emphasis supplied). Spisak extracts the above-emboldened language to claim that a juror might somehow unconstitutionally apply it to both aggravating and mitigating factors. Consequently, Spisak claims, the jury did not suitably limit the evidence it was permitted to access, resulting in an arbitrary and capricious sentencing.

The court disagrees. Supreme Court jurisprudence dictates that a capital sentencer must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); see also *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) (holding "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."). The court finds that the trial court comported with this constitutional mandate. When taken in context, rather than isolating portions of the mitigation charge as Spisak does in the Petition, it is clear that the trial court properly limited the jury's consideration of "any evidence" to mitigating evidence and a reasonable juror would interpret it as such. Therefore, Spisak's ninth ground for relief lacks merit and the Ohio Supreme Court reasonably concluded so.

2. Ineffective Assistance of Counsel Claims

In his sixth and tenth grounds for relief, Spisak asserts that his trial counsel provided ineffective assistance of

counsel during the mitigation phase of trial and provides a litany of actions or inactions that he believes supports such claims.

The Sixth Amendment dictates that a criminal conviction must arise from "an adversarial process, rather than the ex parte investigation and determination by the prosecutor." *Nix v. Williams*, 467 U.S. 431, 453 (1984). As such, a criminal defendant is entitled to more than mere appointment of counsel. Counsel's performance during a criminal trial must be sufficient to ensure a defendant's trial was fair. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To determine whether a criminal defendant received the meaningful representation the Sixth Amendment mandates, a reviewing court must submit counsel's performance to a two-pronged analysis. *Id.* at 687. First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in trial counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. As the Supreme Court stated, "'Judicial scrutiny of a counsel's performance must be highly deferential'" and . . . 'every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Cone v. Bell*, 535 U.S. –, 122 S.Ct. 1843, 1852 (2002) (quoting *Strickland*, 466 U.S. at 689). A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy. *Strickland* at 689.

When challenging a death sentence, "the question is whether there is a reasonable probability that, absent the efforts, the sentencer - including an appellate court, to the extent it independently re-weighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694. A verdict "only weakly supported" would be more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Id.* at 696.

Mindful of the above law, the court now turns to Spisak's grounds for relief.

a. Sixth Ground for Relief

Although Spisak did not divide this claim into sub-claims in his Petition, the court does so now for purposes of procedural default analysis.[14] In the sixth ground for relief, Spisak asserts that trial counsel essentially committed four types of error during the closing argument of mitigation. These errors are: (1) counsel's depiction of the murders and references to the victim's families; (2) personal references to Spisak that Spisak asserts were demeaning; (3) stating to the jury that the only mitigation they could find was "within themselves"; and (4) referencing various of Spisak's acts as "aggravating circumstances." The court finds that Spisak's sixth ground for relief is not procedurally defaulted as all sub-claims were raised with the Ohio Supreme court as

[14] For efficiency, the court has grouped similar claims together.

Proposition of Law LVII. Consequently, the court will subject each sub-claim to a merit review.

The Sixth Circuit's decision in *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997), provides some guidance on evaluating a claim that trial counsel provided ineffective assistance by verbally attacking his own client during the trial. There, the court found that Rickman succeeded in showing both that his trial counsel's performance was deficient and that he was prejudiced by the deficient performance when counsel "convey[ed] to the jurors an unmistakable personal antagonism toward Rickman, characterized both by attacks on Rickman and by repeatedly eliciting information detrimental to Rickman's interests." *Id.* at 1158. For example, rather than attempting to disassociate Rickman from a hand grenade that allegedly belonged to him but was unrelated to the murder for which he was on trial, Rickman's counsel actually elicited testimony from several witnesses in an attempt to link Rickman to the grenade. He even presented one witness to describe Rickman's threats to commit crimes with the grenade, all of which were, again, unrelated to the crime for which he was charged.

In addition, counsel went to considerable effort to portray Rickman as crazed and dangerous. He repeatedly asked one witness if he believed Rickman was "nuts" and ridiculed the witness when he responded in the negative by saying, "You wouldn't know a psychiatric case if you saw one, would you?" *Id.* (quoting *Rickman v. Dutton*, 864 F.Supp. 686, 702 (M.D. Tenn. 1994)). He asked Rickman's girlfriend if Rickman ever "'act[ed] like a bull. . . I mean, violent. . . .'" *Id.* (quoting *Rickman*, 864 F.Supp. at 702). In response to testimony by one of Rickman's neighbors that he believed Rickman was a gentleman, counsel stated: "'[Nineteen)] years in the Marines and you would think that a man that looked like that was a gentleman?'" *Id.* (*quoting*

Rickman, 864 F. Supp. at 703). The Sixth Circuit believed the following statement by Rickman's counsel during the sentencing phase of the trial best evidenced his patent hostility toward his client:

> I know this young woman was put in the trunk of that car. That's no secret. I know that. And I'm not happy about it. No sir, I'm not happy. I'm ashamed. I'm ashamed that we live in such a world. . . . I'm ashamed that this crime has been committed in our community. And I want the family of Debra Groseclose to know that. That I'm ashamed. I'm ashamed that this young woman died in this oven. Mr. Miler, I'm ashamed. I'm ashamed, Mr. Stanton. I don't condone murder. I know criminal defense lawyers suffer from what is called guilt by association. When I go to church Sunday, they are going to waylay me out at the Bellevue Baptist Church. . .
>
> (T)hat wild man (Rickman) over there with the gloves on - look at him. He's wild as a March hare, right now. He may take off after me in a minute. I don't know. He's crazy. I know he's crazy. Because if he's normal I can only say, thank you, God, I'm abnormal, an [sic] you are abnormal.

Id. at 1159 (quoting *Rickman*, 864 F.Supp. at 704 n.9).

In addition to these attacks on his own client, the court found that Rickman's counsel had completely abdicated his duty to provide a defense for Rickman. Counsel assumed there was no defense to the charge of first-degree murder against his client and failed to conduct any investigation. He did not interview any witnesses, conduct

any legal research, or obtain any records, including those regarding Rickman's employment, education, or mental health. By his own account, he spent only sixteen hours preparing for Rickman's trial. Indeed, even though counsel claimed that it was his strategy during the sentencing phase to show that Rickman was a "sick boy", he forwent an insanity defense during the guilt phase. *Id.* at 1157.

Taking into account counsel's "total failure to actively advocate his client's cause with his repeated expressions of contempt for his client", the court found that he was ineffective. In fact, the court found that because counsel's behavior was so outrageous, Rickman was "'[f]unctionally . . . totally denied counsel even though his attorney [was] physically present during the proceedings. '" *Id.* at 1157 (*quoting Rickman*, 864 F.Supp. at 701). Therefore, despite the overwhelming evidence of Rickman's guilt, the court determined that counsel's peifol111ance dispensed with the need for a separate showing of prejudice under Strickland because "what (counsel) did. . . (was) worse than no representation at all" *Id.* at 1159.

None of Shaugnessy's conduct of which Spisak complains rises to the level of counsel's conduct in Rickman. Indeed, each of the alleged errors that Spisak asserts Shaugnessy committed during the closing arguments of the mitigation phase can easily be attributed to a trial strategy such that counsel's performance cannot be said to be "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. For example, Shaugnessy's vivid portrayal of the murders and his own expressed sympathy for the victim's families were likely part of a strategy to ingratiate himself with the jury and to blunt the prosecutor's depiction of the murders in his forthcoming closing argument. Given the crimes for which Spisak had been convicted, the jury might have seen Shaugnessy as callous if

he had not acknowledged their heinous and brutal nature. Once counsel persuaded the jury that he could identify with their emotions toward Spisak, he could then explain to them that their feelings were misplaced because Spisak suffered from a mental defect.

Shaugnessy's negative references to Spisak were also clearly part of the defense's strategy in mitigation, that is, to show that Spisak's mental defect was a mitigating factor to be considered in determining whether or not he should receive the death penalty. While Shaugnessy called Spisak "sick" and "demented", (Tr. at 2895), and similar adjectives throughout his closing, it is evident from reviewing these references in the context of the entire argument that they were made to support the claim that Spisak suffered from mental problems. Counsel's reference to "Jack the Ripper" likewise fails to support Spisak's claim of ineffective assistance. Although Spisak argues that counsel actually referred to him as Jack the Ripper, it is obvious from a reading of the entire statement at issue that this is not the case: "[E]ven Jack the Ripper didn't spend 24 hours a day strangling ladies in London with silk stockings." (Tr. at 2919). Furthermore, while cross examining the defense's experts, the Prosecutor attempted to undermine their findings that Spisak suffered from a mental defect by asserting that Spisak displayed rational behavior much of the time. Counsel's Jack the Ripper comment was plainly made in response to this assertion.

Next, counsel's statement that the only mitigation the jury could find was "within themselves" was not unreasonable. This statement was made as a preface to counsel's soliloquy on the values of American jurisprudence in which he believed each juror had been steeped. Specifically, after making this statement, counsel argued that:

> our country has been founded on (the belief) . . . that you can't commit a sin if you didn't have the ability to intend to do it. . . . And the reason we have this [mitigation] hearing is because we are a humane people. . . . We are different, and that's why our Legislature has put [this mitigating factor, whether, at the time of the committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, into the statute, because we are a humane people. So if we find a mitigating factor, ladies and gentlemen, it is nothing from within this sick tormented body, it is within ours. It is in the way we grew up, the things that we are proud of. The philosophies that we have, the beliefs that we are wiling to stand up and be counted for, and we are different.

(Tr. at 2898 - 2900). Counsel then went on at great length about the testimony from each of the defense's three psychological experts and how such testimony demonstrated that Spisak's mental defect substantially reduced his ability to conform his conduct to the requirements of the law. In other words, there is simply no question that by the end of counsel's closing argument the jury would not have understood that Spisak was relying on his mental defect as a mitigating factor and that, pursuant to the Ohio statute on mitigation, such reliance was proper.

Finally, counsel did not fall below *Strickland*'s standard for professional competence when he used the words "aggravating circumstances" while depicting the murder scenes. This blunder, Spisak asserts, violated the

holding in *State v. Jenkins*, 473 N.E.2d 264, 308 (Ohio 1984), which states that a part may not introduce evidence regarding non-statutory aggravating circumstances. Like Shaugnessy's portrayal of the murder scenes, counsel was likely attempting to preempt the Prosecutor's closing argument, which Shaugnessy knew would focus on the aggravating circumstances at issue. There is nothing in the transcript that would suggest that counsel was attempting to introduce evidence regarding any aggravating circumstances other than the specifications with which Spisak was charged. Moreover, Spisak overlooks the fact that closing argument does not comprise "evidence" that a jury may consider during deliberations. *State v. Brown*, 679 N .E.2d 361, 371 (Ohio Ct. App. 1996 (citing *State v. Turner*, 631 N.E.2d 1117, 1120 (Ohio Ct. App. 1993); *State v. McWhite*, 597 N.E.2d 168, 171 (Ohio Ct. App. 1991). Spisak's jury was so instructed. (Tr. 2354).

From the foregoing, it is apparent that this case is a far cry from *Rickman*. Whereas the effect of counsel's conduct in *Rickman* was "to provide Rickman not with a defense counsel, but with a second prosecutor," *Rickman*, 131 F.3d at 1156, the same cannot be said of Spisak's counsel. Every move Rickman's counsel made had the effect of portraying his client as a "hated and violent freak." *Id.* at 1160. While counsel in the instant case made sporadic references to Spisak that certainly cast Spisak in a negative light, each such reference was made for a particular purpose. Although it may not have been necessary for counsel to speak negatively about Spisak to establish his defense, Spisak has not overcome the presumption that counsel's attacks on Spisak were part of an overall trial strategy. Moreover, counsel's negative references were flanked by his lengthy argument on the experts' testimony regarding Spisak's mental defect and the effect such defect had on his ability to conform his actions to the requirements of the law.

Furthermore, in contrast to Rickman's attorney, who did nothing throughout either the guilt or the sentencing phase to provide his client with a defense, Spisak's counsel elicited testimony from numerous witnesses during the trial, including a number of psychological experts. As counsel's examination of these experts in the mitigation phase demonstrates, he was thoroughly familiar with each of their findings and the bases therefor. Moreover, he objected to numerous questions by the prosecution and made significant attempts to rehabilitate each of the witnesses on re-direct after cross examination.

Even assuming counsel's performance was deficient, Spisak cannot claim that he was prejudiced by counsel's behavior. For the reasons discussed above, the court cannot presume prejudice as did the court in Rickman. Unlike in that case, Spisak was not functionally denied counsel as each of the errors counsel allegedly made can be attributed to a trial strategy. Thus, the court must engage in the customary *Strickland* prejudice analysis. To ascertain whether counsel's performance prejudiced a criminal proceeding under Strickland, a reviewing court does not speculate whether a different trial strategy might have been more successful, but a court must "focus[] on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). On review, the court cannot find that any of counsel's alleged errors resulted in a fundamentally unfair proceeding.

Here, there is no question that Spisak committed the murders with which he was charged. Spisak spent a number of days testifying about the gruesome details of each. Therefore, this is not a situation where the verdict was "only weakly supported" and thus more susceptible to influence of counsel error than one which is supported by an

overwhelming record. *Strickland,* 466 U.S. at 696. Moreover, had counsel portrayed Spisak with sympathy, depicting him as a victim of an unhappy childhood and identity crisis, as Spisak now suggests he should have, the jury still would have been well within its province to decide that death was the appropriate sentence. There simply is not a reasonable probability that, absent counsel's alleged errors, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *See id.* at 694. Given the heinous nature of the murders, Spisak's self-admitted lack of remorse, and the totality of evidence, most of which Spisak supplied during his testimony, the court finds that any error counsel may have committed did not prejudice the fairness of Spisak's trial. The Ohio Supreme Court's decision to deny this claim was not unreasonable. Accordingly, Spisak's sixth ground for relief is not well-taken.[15]

b. Tenth Ground for Relief

In Spisak's Tenth Ground for Relief, he asserts trial counsel's ineffectiveness for several acts or omissions during mitigation. Specifically, Spisak asserts that trial counsel erred when they failed to: (1) object to the trial court instructing the jury that it could consider nineteen specifications; (2) assert the statutory mitigating factor that Spisak had no criminal record pursuant to Ohio Rev. Code § 2929.04(B)(5);

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[15] With respect to Spisak's claims regarding counsel's comments that the only mitigation they could find was "within themselves" and his references to various of Spisak's acts as "aggravating circumstances" in particular, the court finds that the court's instructions to the jury on mitigating and aggravating circumstances alleviated any prejudice Spisak might have suffered from these comments. Specifically, after defining both terms, the court listed each of the aggravating circumstances at issue (i.e., the specifications charged in the indictment) and explicitly identified the mitigation circumstance on which Spisak was relying.

(3) prepare for the mitigation phase until after Spisak was found guilty; (4) assert Spisak's Nazi beliefs were a rationalization to cloak his personality disorder; (5) obtain records from the gender dysphoria clinic or interview the physicians who treated Spisak when he decided to undergo a sex change operation; (6) present evidence regarding Spisak's gender identification confusion and childhood sexual development; (7) meet with psychiatric and psychological experts before trial, (8) prepare mitigation experts; and, (9) object to the prosecutor's remarks.

The court finds that various sub-claims of Spisak's Tenth Ground for Relief were not raised to the Ohio Supreme Court and, thus, are procedurally defaulted. While sub-claims (3), (7), (8), and (9) were presented on direct appeal as part of Proposition of Law LVII, sub-claims (1), (2), (4), (5), and (6) were not presented on direct appeal although they were contained in the record.[16] Thus, these claims are procedurally

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[16] The court notes that Respondent was unable to supply Spisak's post-conviction relief brief in the Return of Writ. Consequently, the court is unable to determine precisely if Spisak raised any of these sub-claims as part of his post-conviction relief petition. The Eighth District Court of Appeals, in its decision denying post-conviction relief, noted that:

> A review of the record before this court demonstrate clearly that defendant-appellant's claims of ineffective assistance of counsel have been raised and litigated twice before this court and once before the Ohio Supreme Court. Accordingly, this court will not delve into those claims once more as they are barred by the doctrine of res judicata.

State v. Spisak, Case No. 67229, 1995 WL 229108, at *4 (Ohio Ct. App. April 13, 1995) (citations omitted). The court notes, however, that any claim that could have been raised on direct appeal but was not is unexhausted and would be barred under the Perry rule if raised in the Ohio courts. Consequently, the court deems any claims not raised on direct appeal that were cognizable at that juncture of the proceedings procedurally defaulted.

defaulted. Even assuming they were not defaulted, the court finds that they are not meritorious.

Sub-claims (l), (2), and (5) are not well-taken because Spisak fails to demonstrate he was prejudiced by counsel's behavior. The court addressed sub-claim (l) as a separate, independent claim, finding that it lacked merit. Thus, Spisak cannot be prejudiced by counsel's inability to object to the trial court's introduction of nineteen specifications.

Second, the court finds that counsel's failure to raise Spisak's lack of prior criminal record as a mitigating factor pursuant to Ohio Rev. Code § 2929.04(B)(5), sub-claim (2), similarly fails. As stated in Strickland, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support." Strickland, 466 U.S. at 696. In this case, there is a strong likelihood that the deluge of evidence supporting the aggravating factors would not have been countermanded by Spisak's prior lawful behavior. Moreover, the Ohio Supreme Court considered this mitigating factor in its re-weighing. *State v. Spisak*, 521 N.E.2d 800, 803-04 (Ohio 1988). Because the court finds the absence of this statutory mitigating factor does not undermine the court's confidence that the proceeding was fair, sub-claim (2) lacks merit.

Finally, the court finds counsel's failure to obtain and present to the jury records from the Gender Dysphoria Clinic of Cleveland Metropolitan General Hospital or interview physicians with whom Spisak met as a result of his inquiries there, sub-claim (5), did not prejudice Spisak. During both the guilt and mitigation phase of trial, counsel introduced

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Spisak does not allege cause and prejudice necessary to excuse the procedural default of these claims.

evidence that Spisak experienced gender identity confusion. Moreover, while counsel did not consult the records or physicians at the Gender Dysphoria Clinic, Dr. Bertschinger did. During mitigation, Dr. Bertschinger testified that he reviewed the records from the Clinic and utilized them in diagnosing Spisak. Further investigation into Spisak's gender confusion was unnecessary as it was adequately presented to the jury. Further psychiatric testimony would have been cumulative. Consequently, the court finds that sub-claim (5) is not well-taken.

Similarly, the court finds sub-claim (6), that counsel failed to present evidence regarding Spisak's sexual development, lacks merit as it is factually incorrect. As stated above, Dr. Bertschinger testified during mitigation that the records from the Gender Dysphoria Clinic "certainly substantiated Mr. Spisak's statement that he was interested in and pursued a sex change operation." (Tr. 2564.) Moreover, Dr. Bertschinger's testimony regarding Spisak's psychiatric diagnosis was comprised of several reports. One such report was that of Mr. Williger, a social worker with Cuyahoga County Court Psychiatric Clinic. Mr. Williger interviewed members of Spisak's family and gathered information regarding his childhood. It was unnecessary for counsel to duplicate those efforts. Consequently, sub-claim (6) is not well-taken.

Finally, sub-claim (4), that counsel was ineffective for failing to portray Spisak's Nazi beliefs as part of his mental disorder and identity crisis, must fail as it merely represents the hindsight second-guessing that *Strickland* seeks to avert. During trial, counsel's strategy was to portray Spisak an insane person who felt he was driven by God to kill as part of his Nazi beliefs. While Spisak now would prefer that counsel had presented a strategy that cast him as an individual fraught with identity confusion and mental

illness, thus turning to Naziism as a symptom of such, that preference is of no avail. *Strickland* prohibits this hindsight review of trial strategy. Thus, the court finds this sub-claim lacks merit.

Spisak asserts in his third sub-claim, a non-defaulted claim, that the trial counsel failed to prepare for the mitigation phase of trial prior to the jury's guilt determination. This is contrary to the evidence in the record. Spisak cites *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), cert. denied, 519 U.S. 910 (1996), in which the Sixth Circuit held such unpreparedness in presenting evidence of a defendant's mental history violated the petitioner's Sixth Amendment right to effective assistance of counsel, in support of his position. Several other Sixth Circuit cases have followed this reasoning. See *Coleman v. Mitchell*, 268 F.3d 417, 449-53 (6th Cir. 2001) (finding counsel acted unreasonably for failing to present evidence of petitioner's horrific childhood, which included physical and psychological abuse); *Skaggs v. Parker*, 235 F.3d 261, 266-75 (6th Cir. 2000)(holding counsel ineffective for failing to investigate and present mitigating evidence); *Groseclose v. Bell*, 130 F.3d 1161, 1169-71 (6th Cir. 1997) (finding counsel's failure to develop "any defense theory whatsoever" and failure to present mitigating evidence was constitutionally ineffective); *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997)(same).

In other more recent decisions, the Sixth Circuit has clarified its previous holdings, stating that "the cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct [a mitigation] investigation." *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001). The court distinguished cases in which counsel failed to investigate altogether from those which "do[] not involve a failure to investigate but,

rather, petitioner's dissatisfaction with the degree of his attorney's investigation," noting that in the latter, the *Strickland* presumption of counsel's reasonableness will be hard to overcome. *Id. See also Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002)(reversing district court and holding no ineffective assistance of counsel for failing to present mitigation evidence, particularly in light of habeas counsel's inability to demonstrate prejudice); *Martin v. Mitchell*, 280 F.3d 594 (6th Cir. 2002) (finding counsel not constitutionally ineffective for failing to present mitigating evidence when counsel did present some, albeit non-exhaustive, evidence in mitigation and petitioner failed to demonstrate prejudice); *Williams v. Coyle*, 260 F.3d 684 (6th Cir. 2001) (same).

Unlike in Glenn, counsel here contemplated the likelihood of a mitigation phase when he initially contacted Dr. Bertschinger, stating that the mitigation hearing "would probably be the 'ball game.'" (Tr. 2656.) More significant is the fact that the mitigation phase began on a Saturday, an unusual practice the trial court noted, so that defense counsel could present the testimony of three experts he had consulted before they went on vacation. (Tr. 2414.) Given the extensive expert testimony provided during mitigation, the court finds that counsel prepared for mitigation prior to the conclusion of the guilt phase. Thus, Spisak's third sub-claim is without merit.

In his seventh sub-claim, Spisak also asserts ineffectiveness because defense counsel never met with Drs. Bertschinger or Markey before trial. This fact is irrelevant, however, because counsel communicated with both experts on several occasions prior to trial and was aware of the their findings. In fact, Dr. Bertschinger testified that an actual face-to-face meeting with counsel was unnecessary and did not affect his contact or diagnosis with Spisak. (Tr. 2698-99.) As such, Spisak cannot now assert he was prejudiced by

counsel's failure to meet with either doctor prior to trial. Consequently, the court finds sub-claim (7) is not well-taken.

Spisak also asserts counsel's ineffectiveness because counsel failed to supply Dr. Bertschinger with Dr. Markey's reports. This fact, claims Spisak, is a further indication of counsel's unpreparedness. Once again, however, Spisak fails to demonstrate the prejudice he suffered because of counsel's inaction. Given the fact that three experts testified regarding the state of Spisak's mental health, it is unclear how counsel's omission would have changed the outcome of the proceeding. Accordingly, Spisak's eighth sub-claim is meritless.

Finally, in sub-claim (9), Spisak contends that trial counsel were ineffective for failing to object to the prosecutor's remarks and questions. Specifically, Spisak argues that defense counsel should have objected to the following exchange between the prosecutor and Dr. McPherson:

> Q: And everyone to a certain extent has a personality disorder?
>
> A: No, I did not so testify.
>
> Q: Well, I'm asking.
>
> A: No.
>
> Q: How about all the people in the penitentiary here?
>
> A: There is a high proportion of persons in the penitentiary who would be diagnosed as having certain other personality disorders, notably conduct disorder unsocialized or conduct disorder socialized.

> Q: And sure, that's what winds them up in the penitentiary. If they do that, if they shoot - if they realized if they go out, rob the guy at McDonald's, shoot him, I'm going to get the electric chair, that's stupid if I do that, if they realize those things beforehand, our police department would be out of business and our penitentiary would be out of people.
>
> A: That would be nice.

(Tr. 2489-90.) Spisak further argues that this interchange somehow suggested to the jury "that non-statutory aggravating circumstances should be considered by the jury." Traverse at 40. The court finds it was not error for trial counsel to fail to object to the above interchange. At that point of the proceeding, the prosecutor was rebutting the defense's assertion that Spisak's personality disorder should, in some capacity, diminish the responsibility he should bear for committing the crimes. The prosecutor was attempting to demonstrate that many individuals who commit crimes suffer from various personality disorders yet society holds them responsible for their actions. This attempt at rebuttal through questioning Dr. McPherson's diagnosis was acceptable in light of defense counsel's assertion. Consequently, it was acceptable for defense counsel not to object to it. The court finds the Ohio Supreme Court's decision to deny these claims on direct appeal was not unreasonable. Thus, Spisak's ninth sub-claim is not well-taken.

3. Prosecutorial Misconduct Claims

In grounds for relief eleven and twelve, Spisak asserts prosecutorial misconduct during the mitigation phase of trial. To successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned.

The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). This question must be answered in light of the totality of circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467,473 (6th Cir. 1989), cert. denied, 495 U.S. 950 (1990). The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989) (Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

The Sixth Circuit engages in a two-pronged analysis when determining whether prosecutorial misconduct violated a defendant's due process rights. *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002). As the *Macias* court stated:

> First, we must consider whether the prosecutor's conduct and remarks were improper. If we conclude that the remarks were improper, then we must apply the four-factor test set forth in *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994), to determine "whether the impropriety was flagrant" and thus violated the defendant's due process rights. The four factors are as follows: "(l) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001). Before proceeding to the four factors of the *Carroll* test, we must first

> determine whether the prosecutor's statements were improper. Although a prosecutor is allowed "to argue reasonable inferences from the evidence," *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000), he or she is not allowed to misstate the evidence. *Carter*, 236 F.3d at 784. It is thus "improper for a prosecutor, during closing arguments, to bring to the attention of the jury any purported facts that are not in evidence and are prejudicial." *Byrd*, 209 F.3d at 535 (internal quotation marks omitted).

Id. at 452 (further citations omitted). Only if the comments were both improper and flagrant will the petitioner be entitled to relief. Thus, a habeas court must review alleged prosecutorial misconduct not to determine the prosecution's culpability, but whether or not, despite any alleged misconduct, the petitioner received a fair trial. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Mindful of the above law, the court now turns to Spisak's individual grounds for relief.

a. Eleventh Ground for Relief

In the Eleventh Ground for Relief, Spisak asserts the prosecutor improperly introduced the testimony of Ms. Beverly Murphy, unduly prejudicing Spisak thereby. The court notes that Spisak raised this claim to the Ohio Supreme Court as Proposition of Law L. As such, the court will review the merits of the claim.

Murphy testified as a state rebuttal witness during mitigation. She was a prostitute with whom Spisak had a relationship. The state apparently sought Murphy's testimony to rebut Spisak's portrayal of their relationship as a romantic one. Dr. Bertschinger noted this fact as significant in arriving

at his diagnosis because Spisak purportedly held a deep hatred for African-Americans yet maintained a relationship with Murphy, an African-American woman. Defense counsel objected to her testimony on the grounds that it did not rebut the evidence presented during the defense's case-in-chief – that Spisak was mentally ill. After a sidebar conversation, however, the trial court permitted Murphy's testimony.

On the witness stand, Murphy testified that the nature of her relationship with Spisak was "strictly business." When asked whether Spisak was mistaken in his belief that their relationship included anything more, Murphy replied, "Frank is definitely mistaken. Me and Frank never were girlfriends and boyfriends." (Tr. 2814.) On cross-examination, however, defense counsel attempted to demonstrate that a romantic relationship had developed. Although Murphy denied accompanying Spisak to specific places proffered by defense counsel, Murphy admitted that she may have misled Spisak:

> Q: All right, and do you ever, do you ever fake [a romantic interest] at all if you got a really rich trick? Do you kind of make him think that you like him and you'd like to be with him. . . ?
>
> A: Yes, I do. I like to have the repeat business so quite naturally I would put on an act for them.
>
> Q: Sure. And you put on an act for Frank, didn't you?
>
> A: Yes, I did.

(Tr. 2849.) Thus, Murphy admitted that she simulated affection for Spisak.

Respondent alleges in the Return of Writ, that Murphy's testimony was necessary to counter Dr.

Bertschinger's assessment that the seemingly paradoxical relationship with Ms. Murphy evidenced his mental illness. Instead, Respondent alleges, utilizing Murphy's services was yet another method by which Spisak could exploit African-Americans. Spisak correctly notes, however, that on cross-examination the prosecutor questioned Dr. Bertschinger regarding the Spisak-Murphy relationship. Dr. Bertschinger responded that his diagnosis would remain unaltered regardless of the nature of their relationship.[17]

Because Dr. Bertschinger's diagnosis would not have changed if Murphy's depiction of her relationship with Spisak were correct, it appears her testimony did not truly rebut Dr. Bertschinger's conclusions. Consequently, the trial court erred when it permitted Murphy to testify. The court will therefore treat this claim as a trial error claim, rather than one of prosecutorial misconduct.

Alleged error in the admission of evidence, standing alone, are not enough to entitle a petitioner to relief pursuant to 28 U.S.C. § 2254. Review of a state court's evidentiary ruling on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewable by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Skaggs v. Parker*, 27 F.Supp.2d 952, 985 (W.D. Ky. 1998) (quoting *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994)); *see also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988) (holding "errors in the application of state law, especially rulings regarding the admission or exclusion of

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[17] Specifically, Dr. Bertschinger stated, "Whether he was with a black prostitute or someone that was a black prostitute that he was friendly with, none of that is consistent with the other side, if you will, of his history, do you see, hatred towards blacks." (Tr. 2605.)

evidence, are usually not to be questioned in a federal habeas corpus proceeding")(citations omitted).

The court finds that although the testimony of Beverly Murphy was not particularly relevant to the state's rebuttal case, it was not sufficiently prejudicial to deny Spisak a fair trial. The testimony that both the prosecutor and defense counsel elicited from Murphy tended to establish that Spisak was misled by Murphy's conduct into believing their association extended beyond a business relationship. It is true that this fact has little to do with rebutting the means by which Dr. Bertschinger arrived at his diagnosis. However, whether viewed as irrelevant or rebuttal testimony, Spisak did not suffer prejudice as a result. Because the admission of Murphy's testimony did not deny Spisak the right to a fair trial, the court finds the Ohio Supreme Court's decision to deny this claim was not unreasonable. Thus, this ground for relief is not well-taken.

b. Twelfth Ground for Relief

In the Twelfth Ground for Relief, Spisak asserts numerous instances of prosecutorial misconduct occurring during the mitigation phase prejudiced him. This claim is not procedurally defaulted because Spisak raised it as Proposition of Law XLIX to the Ohio Supreme Court. Thus, the court will address the merits of this claim.

Spisak alleges some instances of prosecutorial misconduct occurred during the prosecutor's cross-examination of Dr. Bertschinger. In an attempt to dispel Dr. Bertschinger's conclusion that Spisak's relationships with African-American women while espousing hatred against African-Americans was a symptom of his mental disease, the prosecutor asked Dr. Bertschinger whether he knew that Spisak wanted to be their pimp. (Tr. 2604.) Additionally, when asking Dr. Bertschinger to recount Spisak's

homosexual activity, the prosecutor inquired if Spisak solicited men to engage in sexual encounters with him during the time he was cross-dressing. Dr. Bertschinger responded in the affirmative.

Spisak also contends that the prosecutor prejudiced the mitigation proceeding by referring to Dr. Markey's stricken testimony when re-cross-examining Dr. Bertschinger. Upon questioning Dr. Bertschinger regarding his diagnosis, the prosecutor asked whether the doctor was aware that Dr. Markey initially drafted a report indicating Spisak had diminished capacity to refrain, but testified at trial that Spisak suffered from no mental disease or defect. (Tr. 2653.) Because Dr. Markey's testimony was stricken from the record, Spisak cites this reference to it as prejudicial.

Finally, Spisak lists pages of trial transcript corresponding to the prosecutor's closing argument as prejudicial. Because these page references coordinate with the transcript cites and explanation found in Spisak's brief on direct appeal to the Ohio Supreme Court, the court will assume that Spisak intended to articulate the identical arguments here. Specifically, the prosecutor disparaged the evidence presented by the defense as "insulting" and "mumbo jumbo." (Tr. 2950, 2952.) Moreover, Spisak alleges that the prosecutor's closing argument disparaged him by referring to him in derogatory terms, insinuating that Spisak lied, and likening him to a "rat" who hid in the basement, seeking to evade police detection. (Tr. 2941, 2955.) Spisak also contends the prosecutor unfairly commented that he would not have plead insanity had Coletta Dartt or John Hardaway been killed, (Tr. 2957), felt no remorse about shooting and injuring John Hardaway, (Tr. 2946), and was unable to support his wife and child. (Tr. 2943.)

As required by the law stated above, the court will analyze Spisak's claims in light of the totality of

circumstances in the case. The court concludes that while some prosecutorial comments to which Spisak objects may be repugnant, they did not deny Spisak due process or inject any fundamental unfairness into the trial. The court finds the Ohio Supreme court acted reasonably in denying this claim. Accordingly, Spisak's twelfth ground for relief not well-taken.

C. Grounds for Relief Relating to Petitioner's Appeals and Post-Conviction Review

1. Thirteenth Ground For Relief

In his Thirteenth Ground for Relief, Spisak asserts the ineffectiveness of his initial appellate counsel. The court will address this claim on the merits as it was raised to the Ohio Supreme Court as the LXI (61st) Proposition of Law.

As stated above, during Spisak's appeal to the Eighth District Court of Appeals, appointed counsel, who also served as Spisak's trial counsel, raised only one issue: Whether or not the trial court erred by ruling that before an expert doctor could testify before the jury that the expert doctor must have found the defendant-appellant to be "legally insane." On July 30, 1984, the Eighth District affirmed the conviction.

Counsel then filed a timely notice of appeal. Spisak then sued his counsel, which led the Ohio Supreme Court to permit the withdrawal of initial counsel and appoint the Ohio Public Defender to represent Spisak. Upon appointment, the public defenders assigned to the case filed three motions to remand to the Eighth District. The Ohio Supreme Court granted the first two motions to remand and ordered the Court of Appeals to supplement the record, permit Spisak to participate in the review process, and reevaluate its decision based on the supplemented record. After holding two hearings, in which Spisak's new counsel participated, the

Eighth District Court of Appeals again affirmed Spisak's convictions. *State v. Spisak*, No. 82884, slip op. (Ohio Ct. App. May 27, 1986). When Spisak moved for a third remand, however, the Ohio Supreme Court denied the motion. On November 24, 1986, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four Propositions of Law. After hearing these issues, the Ohio Supreme Court affirmed Spisak's conviction. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988).

Spisak now claims he was prejudiced by initial appellate counsel. Specifically, he asserts that initial appellate counsel should have raised the following claims on appeal:

> (1) Petitioner was convicted of four separate aggravated murders and nineteen separate aggravating circumstances when only three killings took place.
>
> (2) The Court allowed the jury to consider 19 separate aggravating circumstances without merging them thereby making the sentencing/weighing process totally unreliable.
>
> (3) Trial Court's exclusion of all expert (proffered) testimony on the insanity issue, including the method of excluding the testimony of Dr. Markey in front of the jury.
>
> (4) The Court's refusal to charge on insanity in spite of expert and lay testimony.
>
> (5) Trial Court's exclusion of Petitioner's testimony of his delusional beliefs.
>
> (6) The procedural errors in Petitioner's Motion to Suppress and the subsequent denial

of the Motion. Additionally, failure to file a Motion to Suppress regarding the warrantless search of Ronald Reddish's automobile; residence; and Petitioner's property within same.

(7) Prosecutorial misconduct.

(8) The erroneous comments of the Trial Court and the Prosecutor that the jury's death verdict is only a recommendation.

(9) The exclusion of Thomas J. Schmitt from the jury.

(10) The use of Beverly Murphy as a rebuttal witness in the mitigation phase of the trial.

(11) Constitutionality of Ohio's death penalty statutes; statutorily mandated proportionality process.

(12) Failure of the Trial Court to require the presence of Petitioner when jurors were being excused during voir dire.

(13) The Trial Court's order, without the benefit of an evidentiary hearing, that Petitioner appear before the jury shackled and the Trial Court's failure to instruct the jury regarding the Petitioner's shackles.

(14) The Prosecutor's repeated use of witnesses who had no relevant testimony and who were called only for the purpose of evoking sympathy for the victims and their families.

(15) The Prosecutor's repeated use of pictures, testimony and speculation to emphasize the

> horrible nature of the crimes for purposes of inciting the jury.
>
> (16) The Trial Court's failure to exclude evidence previously ruled inadmissible from the jury room during the jury's deliberations.
>
> (17) The Prosecutor's repeated use of prior acts of Petitioner for purposes of prejudicing and inciting the jury.
>
> (18) The failure of the Trial Court to properly instruct the jury in the mitigation phase.

Petition at 53-54.

A habeas petitioner may base his or her assertion of appellate counsel's ineffective assistance on one of two federal constitutional grounds: first, a petitioner may claim that he or she was actually or constructively denied counsel on appeal, denying his or her Fourteenth Amendment due process right thereby. Second, and more typically, a habeas petitioner may assert that he or she was denied the Sixth Amendment right to effective assistance of counsel. As the court will discuss below, a reviewing court must undertake distinct analyses depending upon the alleged constitutional violation on which a petitioner bases his or her claim. In the instant case, Spisak argues alternatively that he was denied appellate counsel pursuant to a Fourteenth Amendment due process claim, and a Sixth Amendment right to effective assistance of counsel. The court now analyzes both claims distinctly, and finds that both are without merit.

The United States Supreme Court has determined that a criminal defendant has a Fourteenth Amendment due process right to effective assistance of counsel during the first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *see also Anders v. California*, 386 U.S. 738 (1967)

(requiring court to institute prophylactic procedure to safeguard defendant's right to appellate counsel when counsel determines no meritorious issues exist); *Douglas v. California*, 372 U.S. 353 (1963) (holding indigent defendant entitled to court-appointed counsel on first appeal as of right).

To succeed on a Fourteenth Amendment denial of appellate counsel claim, a petitioner must demonstrate that he or she was actually or constructively denied counsel on appeal. *Smith v. Robbins*, 528 U.S. 259, 286 (2000). Once a habeas court determines that the petitioner essentially acted without counsel on appeal, the court does not engage in the effective assistance of counsel analysis announced in *Strickland v. Washington*, supra at 70 or harmless error analysis pursuant to *Chapman v. California*, 386 U.S. 18 (1967). Instead, a habeas court must presume that prejudice occurred, holding the appellate proceeding constitutionally infirm. *Penson v. Ohio*, 488 U.S. 75, 88 (1988).

Courts have found such a constitutional violation in limited instances, such as when counsel asked to withdraw or alerted the court that counsel could find no meritorious issues to raise on appeal. *See, e.g., Lombard v. Lynaugh*, 868 F.2d 1475, 1477 (5th Cir. 1989) (finding denial of effective assistance of appellate counsel when counsel submitted two-page brief to court indicating counsel could find no issues to raise on appeal although several patent trial errors existed); *Jenkins v. Coombe*, 821 F.2d 158, 159 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988) (holding appellate counsel inadequate when counsel raised only sufficiency of evidence claim in five-page appellate brief). Conversely, when a defendant's appeal is subjected to "meaningful adversarial testing," then the appellate proceeding passes constitutional muster. *Carpenter v. Morris*, 914 F.2d 255 (TABLE), 1990 WL 126428, at *2 (6th Cir. Aug. 31, 1990).

In *Carpenter*, the Sixth Circuit held a habeas petitioner's due process right to appellate counsel was not violated although the petitioner retained new counsel in the midst of his first appeal. After initial appellate counsel raised only three issues, petitioner retained counsel who filed a motion for leave to amend the appeal and file a new appellate brief containing ten new issues. The court of appeals denied the motion, but permitted petitioner's new counsel to participate in oral argument. The court of appeals upheld the conviction. Thereafter, new counsel timely filed an appeal to the Ohio Supreme Court containing the three issues initial counsel raised, the ten issues subsequent counsel attempted to raise in appellate court, and one new issue. *Id.* at * 1.

In affirming the District Court's denial of the writ, the Sixth Circuit determined that no due process violation had occurred on appeal. Noting the factual distinctions from *Penson v. Ohio, supra*, the Sixth Circuit emphasized that the petitioner was represented by counsel at all stages of appeal. Furthermore, the court noted that, "[p]etitioner did not attempt to change attorneys until after the briefing was completed. This request was granted, and the court of appeals invited new counsel to join in the next step of the proceedings, the oral argument. Thus petitioner was not denied the counsel of his choice on appeal." *Id.* at *2.

The court finds this case factually more akin to *Carpenter* than to *Lombard* or *Jenkins*. Spisak had, at all times, representation on appeal. The public defenders who represented Spisak were able to participate in two oral arguments before the Eighth District and raised sixty-four issues to the Ohio Supreme Court. These circumstances are not analogous to cases in which counsel withdrew, forcing the appellant to proceed pro se. Rather than viewing the petitioner's appeal from the vantage point of Spisak's initial brief filed in the Eighth District Court of Appeals, the court

believes it more appropriate to review the appellate process in its entirety when making a Fourteenth Amendment analysis. When doing so, the court cannot find that Spisak's due process rights were violated.

Spisak's claims that his Sixth Amendment right to effective assistance of appellate counsel was infringed is also not well-taken. Respondent contends that any traditional, Strickland claim must fail because Spisak cannot demonstrate prejudice as all claims he asserts initial appellate counsel should have raised were subsequently raised to the Ohio Supreme Court. Spisak counter-claims that, even under a Sixth Amendment, Strickland analysis, this court can presume prejudice, requiring him to demonstrate only that counsel's conduct was objectively unreasonable.

Spisak's assertion is a correct one. The Supreme Court has articulated, and recently revisited the issue of what circumstances dictate a presumption of prejudice. In *Smith v. Robbins*, 528 U.S. 259 (2000), the Court reiterated the holding under Strickland, that a court may forego a prejudice analysis in only three categories of cases:

> First, . . . we presume prejudice in a case of denial of counsel. Second, various kinds of state interference with counsel's assistance can warrant a presumption of prejudice. Third, prejudice is presumed when counsel is burdened by an actual conflict of interest, . . . although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance.

Id. at 765 (citations and internal quotation marks omitted). In all other instances, the Court stated, "[w]e thus presume that the result of the proceeding on appeal is reliable, and we

require [a defendant] to prove the presumption incorrect in his particular case." *Id.*

Because none of the factors enumerated above were present in Spisak's case, the court must analyze Spisak's claims under a traditional *Strickland* analysis, requiring Spisak to prove both that counsel acted objectively unreasonable and those actions prejudiced Spisak. *Strickland, supra.* Applying this analysis to claims of ineffective assistance of appellate counsel, Spisak must show that his appellate counsel's performance was deficient, and that the deficient performance so prejudiced the defense that the appellate proceedings were unfair and the result unreliable. *Id.* at 687.

An appellant has no constitutional right to have every non-frivolous issue raised on appeal, *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel. *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990), *cert. denied*, 498 U.S. 1002 (1990). Moreover, an attorney is not compelled to present an argument on appeal for which there is no good-faith factual support merely to avoid a charge of ineffective assistance of counsel. *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986).

To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To satisfy the prejudice prong, the petitioner must show that his or her counsel's errors "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In the context of ineffective assistance of appellate counsel, a petitioner must

demonstrate "that the direct appeal of (those) issuer s) (that appellate counsel did not raise) would likely have been successful." *Leggett v. United States*, 101 F.3d 702 (TABLE), 1996 WL 665580, at *2 (6th Cir. Nov. 14, 1996).

Spisak's claims clearly fail under the prejudice prong. With the exception of sub-claim (12), all the issues Spisak claims initial counsel should have raised on appeal were considered by this court and found to be without merit. Consequently, Spisak cannot demonstrate, as he must, that he was prejudiced by initial appellate counsel's omissions. Thus, Spisak was not denied a Sixth Amendment right to effective assistance of appellate counsel.

Finally, Spisak claims that the Ohio Supreme Court did not provide him a sufficient review of the claims he asserted to that court. Thus, Spisak argues, the Ohio Supreme Court "did not render harmless trial counsel's ineffectiveness at the initial appellate level." Traverse at 109. Moreover, Spisak contends, he was denied the right to two levels of direct appeal as afforded to him pursuant to Ohio Rev. Code § 2929.05. The court finds these claims are not cognizable in a federal habeas proceeding as they present issues of state law only. 28 U.S.C. § 2254. This court must ensure, as the previously cited law dictates, that Spisak's due process and effective assistance of counsel rights have been protected. As it finds they have been, the court's inquiry ends. Accordingly, the court finds the Ohio Supreme Court did not unreasonably decide this claim and Spisak's thirteenth ground for relief is not well-taken.

2. Fourteenth Ground For Relief

In his fourteenth ground for relief, Spisak contends that trial counsel and the trial court failed to maintain a complete record during each stage of the trial proceeding. Specifically, Spisak alleges the following proceedings

contained specified numbers of unrecorded bench or side-bar conferences: (1) thirty-four (34) instances during voir dire; (2) one instance during the competency hearing; (3) three instances during the motion to suppress proceedings; (4) fifty-nine (59) during the guilt phase of trial; and, (5) fifteen (15) during the mitigation phase. The court finds these claims are not procedurally defaulted as they were raised as Propositions of Law IX, XX, XXII, and XLVII to the Ohio Supreme Court. Thus, the court will address this claim, in its entirety, on the merits.

Rule 22 of the Ohio Rules of Criminal Procedure requires all proceedings to be recorded in all serious offense cases, and Ohio Appellate Rule 9(A) requires, "[i]n all capital cases the trial proceedings shall include a written transcript of the record made during the trial by stenographic means." Ohio App. R. 9(A). When a proceeding has not been preserved, counsel may invoke procedures set forth in Ohio Appellate Rules 9(C) or 9(E) to reconstruct the record. Under Ohio law, an error is considered waived in the absence of an attempt to reconstruct the substance of the remarks and demonstrate prejudice. *State v. Jells*, 559 N.E.2d 464 (Ohio 1990), *cert. denied*, 498 U.S. 1111 (1991) (citing *United States v. Gallo*, 763 F.2d 1504, 1529-32 (6th Cir. 1985), *State v. Brewer*, 549 N.E.2d491 (Ohio 1990) cert. denied, 475 U.S. 1017 (1986)).

Upon review of the record, it is clear that Spisak was not denied a fair trial. Lundy v. Campbell, 888 F.2d 467 (6th Cir. 1989). Spisak has failed to set forth any evidence to support a finding that he was denied a fair trial simply because some side-bar conferences were not placed on the record. Other than mere assertion, Spisak does not provide the court with specific information that would support a claim he was prejudiced by the trial court and counsel's failure to make a recording of the bench and side-bar

conferences. A mere assertion is not enough to support a finding that the failure to record these conferences resulted in an unfair trial.

Any error by the trial court would have been harmless. Adopting the test in *Kotteakos v. United States*, 328 U.S. 750 (1946), the Supreme Court in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), held that the test for harmless error is whether the error had a "substantial and injurious effect" on the jury's verdict. Thus, a petitioner must establish that the error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637 (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)); *see also Chapman v. California*, 386 U.S. 18 (1967). Spisak has failed to make such a showing of actual prejudice. Consequently, the court finds the Ohio Supreme Court reasonably denied this ground for relief. Thus, Spisak's fourteenth ground for relief is not well-taken.

3. Fifteenth and Sixteenth Grounds For Relief

In his Fifteenth and Sixteenth grounds for relief, Spisak claims that the Eighth District Court of Appeals caused the ineffective assistance of appellate counsel when it refused to hear new counsel's proposed supplemental claims. Additionally, Spisak contends the Ohio Supreme Court infringed on his due process rights when it: (1) summarily denied his claim that the jury was prejudiced by the trial court's charging the jury on nineteen specifications; (2) improperly weighed the mitigating factor of his diminished capacity under the same standard as an insanity defense; and, (3) provided him with an inadequate appellate review. These facts, Spisak argues, entitle him to a presumption of prejudice for which this court should grant relief. The court finds that neither of these claims are procedurally defaulted as they were raised as grounds for relief Fifty-Seven (57) and Fifty-Nine (59) respectively in Spisak's post-conviction relief petition, the earliest point at which Spisak could have raised

these claims. As such, the court will conduct a merit review of both claims.

Spisak complains that the appellate review process both caused his new appellate counsel's ineffectiveness and was inadequate, violating due process. As stated in section I., *supra*, Spisak's first appointed counsel timely appealed his convictions to the Ohio Court of Appeals for the Eighth District, raising only one issue. The Court of Appeals affirmed the conviction after vacating the aggravated murder conviction on the fifth count of the indictment as well as the five specifications attached thereto. *State v. Spisak*, Nos. 47458, 47459, 1984 WL 13992 (Ohio Ct. App. July 19, 1984).

Thereafter, Spisak received new counsel from the Ohio Public Defender Commission, who filed three motions to remand. The Ohio Supreme Court granted the first two motions to remand and ordered the court of Appeals to supplement the record, permit Spisak to participate in the review process, and reevaluate its decision based on the supplemented record. The portion of the record missing from the first appeal was the record of Spisak's competency hearing. Once the record was complete, the Ohio Supreme Court remanded the case back to the Eighth District with instructions to the Eighth District "that counsel for Appellant be permitted to participate in the review process as required by the Sixth and Fourteenth Amendments of the United States Constitution." Petition at 61.

On remand, the Eighth District held two hearing on January 3 and February 6, 1986, to comply with the Ohio Supreme Court's order. The Eighth District would not, as Spisak requested, permit counsel to re-brief fully additional issues, stating that an appellant should not be entitled to a new appeal merely because he or she receives new counsel. Notwithstanding this admonition, the Eighth District

permitted new counsel to submit a twenty page brief on whether Spisak's sentence was proportional to other capitally sentenced individuals. On May 27, 1986, the Court of Appeals again affirmed Spisak's convictions. *State v. Spisak*, No. 82884, slip op. (Ohio Ct. App. May 27, 1986). Thereafter, Spisak moved the Ohio Supreme Court for a third remand, however, the court denied the motion. On November 24, 1986, Spisak filed a merit brief with the Ohio Supreme Court raising sixty-four Propositions of Law. The Ohio Supreme Court affirmed Spisak's conviction in a four-and-a-half page decision on Aprill3, 1988. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988).

As stated in Spisak's thirteenth ground for relief, once a state affords a criminal defendant the right to appellate review, the state court must conduct that proceeding consistent with due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The United States Supreme Court has approved death penalty schemes that require "the state supreme court [to review] the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate." See *Zant v. Stephens*, 462 U.S. 862,876 (1983) (noting approval of Georgia's capital punishment scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976)). The purpose of requiring this review is to avoid a capricious imposition of the death penalty in favor of a capital punishment scheme that levies capital punishment in a rational, consistent manner. *Barclay v. Florida*. 463 U.S. 939, 960 (1983). Thus, the Court has given state courts discretion to implement capital case appellate review so long as the courts are systematic in their approach.

To analyze these claims, the court will examine the appellate process afforded Spisak in state court *en total*. Initially, the court already has found in Spisak's fifth ground for relief that the trial court committed harmless error when it

permitted the jury to consider nineteen specifications when determining its verdict. Thus, this court, independent of the Ohio Supreme Court, concludes that Spisak's due process rights were not violated by the trial court's failure to merge. Furthermore, the court disagrees with Spisak's factual assertion that the Ohio Supreme Court improperly utilized the test for legal insanity when weighing the diminished capacity mitigating factor. Instead, the Ohio Supreme Court in its re-weighing process merely repeated the language contained in the statute relating to mitigating factors.[18]

The court also determines that Spisak was provided a constitutionally sound review as both the Eighth District Court of Appeals and the Ohio Supreme Court rendered opinions only after re-weighing Spisak's sentence for proportionality purposes. While Spisak correctly asserts that

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[18] That statute provides:

> (B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt. . . . the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances of the offense, the history, character, and background of the offender, and all of the following factors:
>
> ***
>
> (3) Whether, at the time of the committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law;

Ohio Rev. Code § 2929.04(B)(3). *Cf. State v. Spisak*, 521 N.E.2d 800, 803 (Ohio 1988)("Of the mitigating factors. . . appellant relied solely on his allegation that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses.").

the Ohio Supreme Court disposed of his claims in summary fashion, this type of review is distinguishable from failure to review. The Ohio Supreme Court disposed of all sixty-four claims, inmost instances, with citations to state law, yet it performed its re-weighing function properly and sufficiently articulated its finding as to the appropriateness of the death penalty when it stated:

> Of the mitigating factors specified in R.C. 2929.04(B) appellant relied solely on his allegation that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses. R.C. 2929.04(B)(3). Although there was testimony that appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.
>
> Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offenses. Nothing in the nature and circumstances of these deliberate murders

> tempers the gravity of the offenses. We concur with the jury and lower courts that the balance of these factors lies heavily, and beyond a reasonable doubt, on the side of the aggravating circumstances of which appellant was convicted.
>
> Finally, considering all our prior decisions affirming a sentence of death, appellant's sentence was not arbitrarily, freakishly or capriciously applied, and is not disproportionate to such prior sentences. Although the majority of such decisions involved a single victim, in *State v. Brooks*, (1986), 25 Ohio St.3d 114, 25 OBR 190, 495 N.E.2d 407, we affirmed a death sentence involving the murder of defendant's three sons. In the case sub judice, the sentence of death was properly imposed upon appellant.

State v. Spisak, 521 N.E.2d at 803-04. The Eighth District Court of Appeals also independently re-weighed the sentence. *State v. Spisak*, Nos. 47458, 47459, 1084 WL 13992, at * 7-8 (Ohio Ct. App. July 19,1984).

Although it would have been beneficial to the review process to have a more elaborate articulation of the reasons for which the Ohio Supreme Court denied Spisak's substantive claims for relief, a federal habeas court has no ability to mandate such amplification. *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Because the Ohio Supreme Court summarily addressed the merits of Spisak's claims, this court does not afford its determination a presumption of correctness. Thereafter, the court has conducted an independent review under the standard required in 28 U.S.C. § 2254(d). Thus, Spisak has benefitted from the Ohio Supreme Court's brevity. Consequently, his argument that

his due process rights were violated by the Supreme Court process is not well-taken. Finally, Spisak cites to *Swenson v. Bosler*, 386 U.S. 258 (1967), for the proposition that a statutory right to appeal is not satisfied when an appellate court independently reviews the trial transcript for error, without benefit of appellate counsel. That case, however, is easily distinguishable. In *Swenson*, the petitioner had no counsel whatsoever on appeal and was forced to write a pro se appellate brief. While the state court of appeals claimed it independently reviewed the record for trial error, the Supreme Court determined that the benefit of appellate counsel is so substantial, that indigency should not preclude such representation despite the appellate court's assurances. Spisak, however, at no time during the appeal was without counsel. On the contrary, Spisak's counsel presented a noteworthy number of claims to the Ohio Supreme Court for review. Contrary to Spisak's assertions, he received an appellate review that afforded him due process. While not providing sufficient detail to which this court can defer, the Eighth District court of Appeals and the Ohio Supreme Court provided Spisak with a constitutionally adequate review process. Accordingly, Spisak's fifteenth and sixteenth grounds for relief are not well-taken.

D. Grounds for Relief Relating to Search and Seizure Evidence

In grounds for relief seventeen, eighteen, and nineteen, Spisak contends that items introduced during trial were obtained unlawfully because the police officers who obtained such evidence did so without a warrant. The court finds none of these claims procedurally defaulted. These claims were raised as Propositions of Law XI, XII, and XII to the Ohio Supreme Court on direct appeal. Accordingly, the court will address them on the merits.

In his Petition, Spisak alleges that he was a resident of 1367 East 53rd Street on September 4, 1982. On that date, Cleveland Police Sergeant George and other officers received a police radio announcement that someone had discharged a firearm in Spisak's apartment. The officers arrived at Spisak's apartment and knocked on the door. Spisak admitted that he was shooting a gun out the window. Thereafter, Sergeant George demanded to know where the gun was and Spisak pointed to the living room. The officers then entered the apartment and searched it, finding several guns in the apartment.

On September 6, 1982, after acting on an anonymous tip, police arrested Spisak and Ronald Reddish at Reddish's home. The officers conducted a search of Reddish's home and found Spisak's suitcase. Inside the suitcase police found the pager belonging to Timothy Sheehan. Sometime thereafter, the police searched Reddish's 1975 Buick LeSabre.

Before trial, Petitioner's counsel moved to suppress the weapons police found at Spisak's apartment. After hearing testimony from Sergeant George and Spisak, the trial court denied the motion.

1. Seventeenth Ground For Relief

In Spisak's seventeenth ground for relief, he alleges that the weapons police obtained from his apartment on September 2, 1982, were the products of an illegal search and seizure. Respondent correctly asserts in the Return of Writ, however, that this claim is not cognizable in a habeas proceeding pursuant to *Stone v. Powell*, 428 U.S. 465 (1976).

In *Stone*, the Supreme Court held that Fourth Amendment search and seizure claims, or claims invoking the exclusionary rule under *Mapp v. Ohio*, 367 U.S. 643 (1961), are not cognizable in federal habeas proceedings

"where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." Stone, 428 U.S. at 482. Noting that the exclusionary rule is not a personal constitutional right but a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect," the Court reasoned that it would be of little effect to exclude such claims on collateral review. *Id.* at 486 (citations and internal quotation marks omitted).

Because Spisak was afforded a "full and fair review" of this claim by both the trial and Ohio Supreme Court, it falls directly within the purview of claims Stone sought to exclude from habeas review. Consequently, the Ohio Supreme Court correctly determined that Spisak's seventeenth ground for relief is not meritorious.[19]

2. Eighteenth and Nineteenth Grounds For Relief

Spisak asserts that evidence obtained in Reddish's apartment and automobile also violated his Fourth Amendment rights. Spisak asserts these claims elude the scope of Stone as they are asserted as ineffective assistance of counsel claims for failing to move to suppress this evidence; and further, that introduction of this evidence should be considered with other cumulative error claims pursuant to the Fourteenth Amendment right to due process.

Indeed, the Supreme Court has placed limits on the scope of Stone's Fourth Amendment claim prohibition. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Court determined that the prohibition against asserting Fourth Amendment claims in a habeas proceeding does not preclude a petitioner from asserting a Sixth Amendment ineffective

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[19] The court also notes that Spisak did not reply to Respondent's assertion in the Traverse.

assistance of counsel claim for failing to raise such a claim in state court. Similarly, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court determined that a petitioner may assert a Fourteenth Amendment due process claim even if that claim is based on a Fourth Amendment search and seizure issue.

In the instant case, however, such assertions lack merit. First, as stated above, to prove an ineffective assistance of counsel claim a habeas petitioner must demonstrate both that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that he or she was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. at 687. In the instant case, Spisak cannot show that he was prejudiced by the admission of any evidence during trial. Spisak admitted to the murders during his trial testimony. Thus, the exclusion of evidence obtained in Reddish's home or automobile would not have effected the trial's outcome. Spisak cannot claim, consequently, that his counsel was ineffective for raising such issues.

Spisak has not demonstrated that counsel's failure to file a motion to suppress was objectively unreasonable. At the time of Spisak's trial, the Supreme Court had determined that:

> 'In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.'

Alderman v. United States, 394 U.S. 165, 173 (1969)(quoting *Jones v. United States*, 362 U.S. 257, 261 (1960)).[20]

Spisak fails to articulate clearly which interest he had in Reddish's automobile and the precise evidence which was seized from it. In his Petition, Spisak merely asserts that "[t]he seizure and search of the 1975 Buick LeSabre in which Petitioner claimed an interest was illegal." Petition at 72. Spisak fails to provide the court with essential facts, such as what items belonging to Spisak police procured during the search and which items were introduced during trial. A criminal defendant has no standing to bring a Fourth Amendment claim pursuant to an automobile search without demonstrating that he or she was the owner of the automobile or property within it. *Rakas v. Illinois*, 439 U.S. 128 (1979). Because Spisak fails to articulate how counsel's failure to file a motion to suppress these items was unreasonable, this claim also must fail.

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[20] Although the Supreme Court later decided in *Minnesota v. Olson*, 495 U.S. 91 (1990), that a criminal defendant has standing to assert a Fourth Amendment search and seizure claim if he or she is an overnight guest, this case is inapplicable. While Spisak implies in the Petition that he had obtained overnight guest status at the time police discovered him, he admitted during trial that he had not moved from his 53rd Street residence. (Tr. 27.) Thus, he was not an overnight guest and had no standing to object to the introduction of the items seized. *See United States v. Pollard*, 215 F.3d 643,648 (6th Cir. 2000) (holding co-defendant did not possess standing to assert Fourth Amendment claim when he had never before visited the premises); *United States v. Hiles*, 908 F.3d 974 (TABLE), 1990 WL 106174, at *3 (6th Cir. July 27, 1990) (distinguishing Olson even when defendants had entry access to apartment in which search conducted because defendants exercised no "dominion or control" over premises at time of search). See also *State v. Williams*, 652 N.E.2d 721, 733 (Ohio 1995) (determining defendant had no "reasonable expectation of privacy" in apartment belonging to another individual although he placed some personal items on premises).

As neither claim is meritorious, Spisak also cannot demonstrate that he was denied due process as a result of cumulative error. The Ohio Supreme Court was not unreasonable in denying these claims. Accordingly, Spisak's eighteenth and nineteenth grounds for relief are not well-taken.

E. Grounds for Relief Relating: to "Other Acts" Evidence

1. Admission of Evidence

In grounds for relief twenty, twenty-one, and twenty-two, Spisak alleges his Fourteenth Amendment right to due process and a fundamentally fair trial were infringed by the trial court's decision to admit evidence Spisak claims was irrelevant to the state's case. The court finds none of these claims procedurally defaulted as they were raised to the Ohio Supreme Court as Propositions of Law XXXIX, XL, XLI, and XL VII. As such, the court will address these claims on their merits.

As stated above, alleged errors in the admission of evidence, standing alone, are not enough to entitle a habeas petitioner to relief pursuant to 28 U.S.C. § 2254. Review of a state court's evidentiary ruling on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewable by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial.'" *Skaggs v. Parker*, 27 F.Supp.2d 952, 985 (W.D. Ky. 1998) (quoting *Kelly v. Withrow*, 25 F.3d 363, 370 (6th Cir. 1994)); *see also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1 988)(holding "errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually

not to be questioned in a federal habeas corpus proceeding") (citations omitted).

"To determine whether the admission of certain evidence violated the defendant's constitutional right to a fair trial, the habeas court must first determine whether the evidence is relevant or probative of an issue on which the prosecution bears the burden of proof." *Id.* (citing *Estelle v. McGuire*, 502 U.S. 62, 69-70 (1991)). If the court concludes that the evidence was relevant to an essential element of the state's case, its inquiry is over; by definition, there has been no due process violation. *Id.* A federal habeas court cannot vacate a state court judgment merely because it would have concluded differently. *Lundy v. Campbell*, 888 F .2d 467, 470 (6th Cir. 1989).

Mindful of the above deference with which this court must review the trial court's evidentiary rulings, the court now turns to Spisak's individual grounds for relief.

a. Grounds For Relief Twenty and Twenty-One

In the above grounds for relief, Spisak claims the trial court erred when it admitted numerous items into evidence that he argues were unrelated to the crimes with which he was charged. First, the police seized, and the prosecution introduced, firearms that Spisak owned but were not used to commit any of the crimes.[21] Additionally, Spisak objects to

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[21] Spisak contends that the following firearms and firearli-related material was introduced into evidence though unrelated to the crimes with which he was charged: (1) Erma Excam gun; (2) Shotgun; (3) parts of a gun; (4) loaded shotgun; (5) .22 caliber 14 semi-automatic sturm ruger; (6) Glenfield Model 60, .22 caliber semi-automatic rifle, loaded; (7) Colt .45 semi-automatic pistol; (8) ammunition; (9) Schematic drawing of Erma Excam Automatic pistol; (10) Copy of magazine article with test Reports of the Erma Excam; and, (11) replica of German semi-automatic pistol. Petition at 74-75.

the state's introduction of Nazi paraphernalia and related evidence.[22] The court finds that the trial court did not violate Spisak's Fourteenth Amendment right to a fair trial by allowing the introduction of such evidence. Both types of evidence support facts that the state sought to prove - that these murders were precalculated and motivated by Spisak's white supremacist beliefs. Because the court finds the admission of such evidence probative, the Ohio Supreme Court was not unreasonable in denying this claim. Thus, Spisak's twentieth and twenty- first grounds for relief are not well-taken.

b. Twenty-Second Ground For Relief

In this ground for relief, Spisak argues that various uncharged acts of violence, such as thoughts about killing his wife, daughter, and wife's family as well as killing an African-American woman in an elevator and threatening to kill a Jewish attorney, were improperly admitted. However, the court finds the admission of this evidence did not affect Spisak's right to a fair trial.

During trial, the prosecution introduced evidence that Spisak had pointed a loaded gun at his ex-wife's head, had cocked the gun, but refrained from pulling the trigger. Spisak also had been involved in an altercation with his ex-wife's father. Finally, the state called Officer Timothy Patton, who testified about statements Spisak had made to police after arrested. Officer Patton testified that one evening, while on the Cleveland State University campus, a meeting was taking place to discuss the killings. Spisak told Patton that a security officer asked Spisak to exit the area, for security purposes,

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[22] Spisak alleges he was denied a fair trial because of the introduction of the following evidence: (1) Anarchist Cookbook; (2) Adolf Hitler Book; (3) Nazi Flag; (4) Harley Davidson wallet with Hell's Angel's Emblem; (5) Welfare Card; and, (6) suitcase containing items of clothing with swastika and cross armband with Nazi emblem. Petition at 76.

where Cleveland State officials were meeting. Officer Patton testified that Spisak indicated that at that point, he decided to kill an African-American woman on an elevator near the meeting so that the officials would be confronted with her body after the meeting. His plans were interrupted, however, when a white person boarded the elevator on a subsequent stop (Tr. 1160-61). The state proffered the above evidence because each of these incidents occurred between the dates of the Rickerson and Warford murders. By introducing instances in which Spisak contemplated murder yet was able to refrain, the state was attempting to demonstrate that, contrary to Spisak's allegations, he was able to quell his urge towards violence when he desired. Thus, this evidence tended to rebut Spisak's insanity plea.

Spisak also argues that because defense counsel did not object to these claims, the court should consider this as part of Spisak's ineffective assistance of counsel claims. This argument is not well-taken. Defense counsel's failure to object to the introduction of this evidence during trial was not objectively unreasonable pursuant to *Strickland, supra,* because it was relevant to the state's case. Thus, the court finds Spisak's twenty-second claim was not unreasonably decided by the Ohio Supreme Court and not well-taken.

2. Prosecutorial Misconduct

In his twenty-third, twenty-fourth, and twenty-fifth grounds for relief, Spisak asserts he was denied the Fourteenth Amendment right to a fair trial because of prosecutorial misconduct. None of these claims are procedurally defaulted as they were raised as Propositions of Law II, XLV, and XLVI respectively to the Ohio Supreme Court. Although the court will address the factual background of each claim individually, the court notes that each claim is governed by the identical law.

As stated earlier, to successfully assert a prosecutorial misconduct claim in a habeas proceeding it "is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnely v. DeChristoforo*, 416 U.S. 637, 642 (1974)). This question must be answered in light of the totality of circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467,473 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990).The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *Fussell v. Morris*, 884 F.2d 579 (6th Cir. 1989) (Table), 1989 WL 100857, at *4 (6th Cir. Sept. 1, 1989).

The Sixth Circuit has utilized a four-part test to determine whether the prosecutor's conduct is egregious: A court should consider: (1) the degree to which the remarks complained of have a tendency to mislead the jury and prejudice the accused; (2) whether they were isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proofs introduced to establish the guilt of the accused. *Macias v. Makowski*, 291 F.3d 447, 451 (6th Cir. 2002). Prosecutors must have considerable latitude in presenting arguments to the jury and reversal should not occur even though the prosecutor's conduct was inappropriate unless prejudicial error is present. *Id.* Mindful of the above law, the court now turns to Spisak's individual grounds for relief.

a. Twenty-Third Ground For Relief

In his twenty-third ground for relief, Spisak asserts that the prosecutor unfairly cross-examined him about "other

acts" unrelated to the crimes charged.[23] Subjecting these remarks cumulatively to the *Heinish* test, the court finds that they do not transgress the bounds of fairness. Indeed, Spisak introduced the very topics which were the subject of the cross-examination to which he objects. Spisak introduced evidence regarding his sexual behavior, Spisak introduced such evidence to demonstrate that his identity crisis, and subsequent drive to suppress his sexual orientation by affiliating with the White People's Party, was one factor indicating his insanity. Similarly, Spisak raised the issue of his political and religious beliefs in an effort to show that God intended that he kill African-Americans. Because Spisak raised these issues, he cannot cry foul when the prosecutor subjects them to cross-examination.

Other remarks, such as the prosecutor's remarks that Spisak was a coward, may be objectionable and of little probative value, but those remarks were isolated and not cumulatively prejudicial. Finally, the strength of the evidence on which Spisak was convicted, such as his confessions to the crimes and the painstaking details he gave as to his motivation, diminish the prejudicial effect of any unnecessary remarks. Accordingly, the court finds that the Ohio Supreme Court's decision on this claim was not unreasonable. As such, Spisak's twenty-third ground for relief is without merit.

b. Twenty-Fourth Ground For Relief

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[23] Specifically, Spisak complains that the prosecutor unfairly raised the following topics during cross-examination: (1) that Spisak was a pimp; (2) Spisak's bizarre religious and political beliefs; (3) Spisak's receipt of public assistance; (4) Spisak's failure to support his family; (5) Spisak's homosexuality; (6) Spisak was a male prostitute; (7) Spisak could not sexually satisfy his wife; (8) Spisak's assaultive actions against his wife; and, (9) Spisak was a coward. Petition at 78.

In his twenty-fourth ground for relief, Spisak contends the prosecutor provided unsworn testimony and permitted a witness to do the same. While attempting to impeach Spisak, the prosecutor questioned him regarding an alleged high school incident in which a white female classmate was dating an African-American male. The prosecutor's purpose for this line of questioning was to attempt to demonstrate that Spisak's Nazi beliefs were longstanding, and not the product of mental illness:

> Q: During high school, then, there was an incident, was there not, where one of the girls had a black boyfriend?
>
> A: I don't remember that.
>
> Q: You don't remember?
>
> A: As I said, there were no black people out there where I went to school.
>
> Q: Do you remember. . . that you were in high school and a young girl had a black boyfriend and you told her not to ever bring that man back?
>
> A: That incident never happened. That was manufactured by the news media people for propaganda purposes.

(Tr. 1579-80.) In an effort to impeach this testimony, the prosecutor brought the woman with whom the alleged incident occurred and asked her to stand in the courtroom:

> Q: Mr. Frank Spisak, do you recognize that young lady wearing the glasses as Marrianne Lewandowski?
>
> Marrianne Nemerosky: Marrianne Nemerovsky. N-e-m-e-r-o-v-s-k-y.

> Q: I'm sorry. Marrianne Nemerovsky, do you recognize this lady as the young lady you went to Midpark High School with and graduated from?
>
> Mr. Shaughnessy: I object to the lady testifying without being sworn, your honor.
>
> A: I never saw her before in my life.
>
> The Court: Okay. Put another question and go to another subject.

(Tr. 1824.)

The court cannot find that the above dialogue constitutes "unsworn testimony" by the prosecutor or Ms. Nemerovsky that would in any way prejudice Spisak. The prosecutor's attempt to impeach Spisak's testimony, albeit unsuccessful, did not mislead the jury. Moreover, the trial court swiftly interceded before Ms. Nemerovsky could do more than correct the pronunciation of her name. Thus, while Spisak may object to her testimony, he cannot claim that he was prejudiced thereby. Because the court finds that this incident is not an infringement on Spisak's right to a fair trial, the court also finds the Ohio Supreme Court did not unreasonably decide this claim. As such, Spisak's twenty-fourth ground for relief is not well-taken.

c. Twenty-Fifth Ground For Relief

In this ground for relief, Spisak cites numerous pages of transcript for the proposition that the prosecutor improperly "testified" regarding Spisak's religious and political beliefs. The court disagrees with this characterization. A review of these pages reveals numerous instances in which the prosecutor questioned Spisak's religious and political beliefs ideals that Spisak put into issue when asserting his insanity defense. Nothing in the nature of

these remarks, once again, could be characterized as "testimony" from the prosecution. Rather, the questions that the prosecutor asked Spisak were part of a rigorous cross-examination. Certainly there were instances in which the defense counsel objected, and the court sustained, some of the state's questions. At no point in the cited transcript, however, can the court conclude that such cross-examination was the equivalent of "unsworn testimony." Thus, the Ohio Supreme Court properly denied this claim and this court finds it is not well-taken.

F. Grounds for Relief Relating to Admission of Exhibits Into Evidence

1. Twenty-Sixth Ground For Relief

In his twenty-sixth ground for relief, Spisak contends that the trial court, after first excluding without comment some of the state's proffered evidence, permitted such evidence to reach the jury during deliberations.[24] The Court finds that this claim is not procedurally defaulted as it was raised as the XXXIII (33rd) Proposition of Law to the Ohio

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[24] Spisak lists the following items as excluded during trial yet submitted to the jury as it began deliberations:

(1) three coroner's photographs of Reverend Rickerson

(2) four crime seen photographs of Reverend Rickerson

(3) Sheehan family photograph

(4) Statement of Betty Braun

(5) two photographs of Mr. Warford

(6) booking slip for Spisak

Petition at 82-83.

Supreme Court. Accordingly, the court will address this claim on the merits.

Respondent does not dispute the veracity of Spisak's factual allegations. Instead, Respondent asserts that any error occurring from the submission of this evidence to the jury was harmless. The court agrees. The United States Supreme Court has determined that not all error, including constitutional error, necessitates conviction reversal. *Rose v. Clark*, 478 U.S. 570, 576 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The Court has differentiated between cases in which "structural" defects occurred, undermining a reviewing court's confidence in the outcome of the proceeding, and those in which trial error occurred, but the constitutional integrity of the proceeding remained intact. *Neder v. United States*, 527 U.S. 1, 8 (1999). In *Neder*, the Court determined that the trial court's omission of a jury instruction on an element of the offense was subject to a harmless error test. *Id.* at 15. The *Neder* defendant was indicted for tax violation offenses which required a false statement as a material element of the crime. *Id.* at 6. The trial court incorrectly instructed the jury that it need not consider materiality to reach its verdict, believing the issue of materiality was a matter for judicial determination. *Id.*

The Court concluded that this error should be subject to a harmless error analysis. The Court opined that most constitutional errors can be reviewed under the hamiless error test, with only a limited class of cases involving constitutional error rising to a level of "structural" defect. *Id.* at 8. *See, e.g., Waller v. Georgia*, 467 U.S. 39 (1984)(denial of public trial); *McKaskle v. Wiggins*, 465 U.S.168 (1984) (denial of self-representation at trial); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased judge presided at trial).

The test for determining if harmless error occurred during trial requires a reviewing court to ascertain whether the "error had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (internal quotation marks omitted). When a reviewing court is in "grave doubt" or equipoise about whether the error affected the jury's verdict, the court must conclude that the error did affect it. *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

First, the court determines that although the trial court improperly permitted some excluded evidence to reach the jury, this error cannot be classified "structural" error. When undertaking a factual comparison between the error occurring in the above-cited cases, such as a complete denial of counsel or self-representation, the court finds that permitting the jury access to the excluded evidence does not rise to that level of error. Thus, the court will subject the trial court's error to a harmless error test.

In doing so, the court finds the introduction of the above-listed items was harmless beyond a reasonable doubt. Spisak admitted in several days of testimony that he committed three murders and attempted two others. Thus, the issue of his guilt was not in question. The jury was not asked to determine who had committed these acts, but whether these acts were committed by one who is insane and should therefore escape criminal liability. The court is, therefore, hard-pressed to find harmful error in the fact that the jury may have viewed some photographs and other evidence tending to depict these acts. Spisak argues, however, that the prejudicial effect of providing access to these items was not merely confined to the guilt phase, but had a "carry-over" effect to the penalty phase of trial. The court disagrees. The jury is presumed to follow the trial court's instructions.

Greer v. Miller, 483 U.S. 756, 767 n.8 (1987); *Holmes v. City of Massilon, Ohio*, 78 F.3d 1041 (6th Cir. 1996), *cert. denied*, 519 U.S. 935 (1996). The trial court properly instructed the jury regarding aggravating circumstances and mitigating factors. Spisak's bare allegations that the jury was unable to follow this instruction is not supported by any evidence. The Ohio Supreme Court reasonably denied this claim. Thus, Spisak's twenty-sixth ground for relief is not well-taken.

2. Twenty-Seventh Ground For Relief

In the twenty-seventh ground for relief, Spisak asserts that the trial court improperly admitted gruesome photographs of the victims contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments. This claim is not procedurally defaulted as it was raised as Proposition of Law XXXII on direct appeal to the Ohio Supreme Court. Thus, the court will address the merits of the claim. In this ground for relief, Spisak alleges that multiple photographs introduced during trial were unduly prejudicial, thereby denying him the right to a fair trial. Specifically, Spisak alleges that the trial court should have excluded the following photographs:

> (1) Five coroner's photographs of Reverend Rickerson
>
> (2) Five photographs of Reverend Rickerson at Cleveland State University
>
> (3) Fifteen photographs of Reverend Rickerson's clothing
>
> (4) Two photographs of Mr. Hardaway at the crime scene
>
> (5) Three coroner's photographs of Mr. Sheehan

(6) Fourteen photographs of Mr. Sheehan's clothing

(7) Eleven photographs of Mr. Sheehan at Cleveland State University

(8) Fifteen photographs of Mr. Warford at the crime scene

Petition at 84-85.

As the court stated previously, admission of evidence is a matter of state law and alleged error, such as improper admission of evidence, usually does not support a writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). A state law violation, however, may rise to the level of a due process violation if it created a serious risk of convicting an innocent person. *Neumann v. Jordan*, 84 F.3d 985, 987 (7th Cir. 1996). A federal court must defer to the state court's interpretation of its own rules of evidence and procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988). A federal court does not act an as an additional court of appeals to review a state court's interpretation of its own laws. *Id.*

The admission of the photographs Spisak alleges are prejudicial was within the sound discretion of the trial court. Admission of gruesome photographs in a murder case typically does not justify collateral relief, even if cumulative and likely to inflame the jury. *Gonzalez v. DeTella*, 127 F .3d 619, 621 (7th Cir. 1997), cert. denied, 523 U.S. 1032 (1998). There is no evidence in this case, other than Spisak's mere allegation, that the introduction of the photographs violated his right to a fair trial. The Ohio Supreme Court correctly denied this claim on direct appeal. Thus, the court finds Spisak's twenty-seventh claim is without merit.

G. Grounds for Relief Relating to Fair Trial Issues

1. Twenty-Eighth Ground For Relief

Spisak asserts in his twenty-eighth ground for relief that the prosecutor improperly impeached him during trial by commenting on his post-arrest silence in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). The court notes that this claim was raised as Proposition of Law XLIV to the Ohio Supreme Court and, thus, is not procedurally defaulted. Accordingly, the court will address the claim on the merits.

During the prosecutor's cross-examination of Spisak, he made the following comments regarding Spisak's initial unwillingness to communicate with police:

> Q: You went to jail and the detective talked to you and, of course, George Rockwell, or whatever his name is, was killed by, I suppose, another patriot in 1967, and he tells you don't talk to the police.
>
> A: That's right.
>
> Q: And that's initially what you didn't do, you didn't talk to the police initially?
>
> A: Initially.
>
> Q: Right. Then once you got your story straight in your mind what you wanted to tell them
>
> Mr. Shauglmessy: Objection.
>
> The Court: Overruled.
>
> Q: You began to talk to the police?
>
> A: I made the decision to talk at some point in time, yes.

(Tr. 1712.)

In Doyle, the Supreme Court determined that implicit in a defendant's post-arrest right to silence articulated in

Miranda v. Arizona, 384 U.S. 436 (1966), is a right not to be penalized for exercising those rights by the prosecutor's attempt to impeach. *Doyle*, 426 U.S. at 618. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), however, the Court determined that to obtain habeas corpus relief for a Doyle violation, the petitioner must demonstrate that the prosecutor's comment "'had [a] substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The Court went on to clarify that while a habeas petitioner is entitled to "plenary review of their constitutional claims, [] they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Id.* (citation and internal quotation marks omitted).

Under the *Brecht* standard, Spisak's claim must fail. During trial, Spisak admitted to three murders and two attempted murders. Thus, any testimony elicited from him in violation of his post-arrest right to silence must be considered in the context of his other testimony. Consequently, Spisak cannot now claim he was prejudiced by the prosecutor's comments. The Ohio Supreme Court reasonably found this claim to be without merit and, after independent review, this court finds similarly.

2. Twenty-Ninth Ground For Relief

In his twenty-ninth ground for relief, Spisak contends that the jury was misled regarding its responsibility to detenl1ine a sentence as both the prosecutor and trial court indicated that it was only a "recommendation." The court finds this claim is not procedurally defaulted as Spisak raised this issue to the Ohio Supreme Court as Proposition of Law XIV. Therefore, the court will address the merits of the claim.

In this claim, Spisak asserts there were several instances during voir dire, and in the trial Court's mitigation phase instructions to the jury, in which the jurors were told that by the prosecutor their verdict would only be a recommendation to the court. While the court will not repeat each instance here, the court will cite some of this language for purposes of illustration:

> Q: Now, do you understand that what happens in a case such as this if the evidence is there, that's what you would do, you would make a determination whether you should recommend to the Judge that the death sentence be imposed; do you follow me?
>
> A: Okay.
>
> Q: And if you as a juror recommend this sentence, then the Judge can either accept that recommendation or he can reject it, all right?
>
> A: Okay.
>
> ***
>
> Q: So if you recommend the death sentence, that does not automatically mean he is going to get the death sentence, it means that Judge Sweeney has to consider it.

(Voir Dire Tr. 293-94.)

The Supreme Court held in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe . . . , that the responsibility for determining the appropriateness of the

defendant's death rests elsewhere."[25] To establish a *Caldwell* violation, the defendant must show that the trial judge improperly described the jury's role under state law in order to dilute its responsibility. *Mapes v. Coyle*, 171 F.3d 408,415 (6th Cir. 1999) (citing *Kordenbrook v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir. 1990)).

Ohio law provides:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the report submitted pursuant to division (D)(l) of this section, the trial jury . . . shall determine whether the aggravating circumstances the offender was foui1d guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be

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[25] The court notes that the Supreme Court also determined that *Caldwell* announced a "new rule" and thus a habeas petitioner cannot claim relief pursuant to Caldwell if his or her conviction became final prior to *Caldwell*. *Sawyer v. Smith*, 497 U.S. 227 (1990). Spisak's conviction became final in 1989, when the Supreme Court denied certiorari. *Spisak v. Ohio*, 489 U.S. 1071 (1989). Because *Caldwell* was decided in 1985, Spisak is not barred from pursuing this claim.

> sentenced to [one of two terms of life imprisonment] . . .
>
> If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the courts shall proceed to impose sentence pursuant to division (D)(3) of this section.

Ohio Rev. Code § 2929.03 (D)(2). Division (D)(3) requires the trial judge to weigh independently the aggravating circumstances and mitigating factors, and impose the death penalty if the aggravating circumstances outweigh the mitigating factors.

In *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985), the Supreme Court held that, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." In rejecting a similar claim to that brought by Spisak, the Sixth Circuit in *Buell v. Mitchell*, 274 F.3rd 337, 352 (6th Cir. 2001), held that "[i]t is an accurate statement of Ohio law for a trial judge to instruct a jury that their finding that a death sentence is warranted is a recommendation.

It is specifically stated in Ohio Rev. Code § 2929.03(D)(2) that if the jury unanimously finds that aggravating circumstances outweigh mitigating factors 'the

trial jury shall recommend to the court that the sentence of death be imposed on the offender.'" Accordingly, Spisak cannot argue that the prosecutor or trial court incorrectly described Ohio law. On direct appeal, the Ohio Supreme Court acted reasonably when denying this claim. Thus, Spisak's twenty-ninth ground for relief is not well-taken.

3. Thirtieth Ground For Relief

Spisak argues in his thirtieth ground for relief that the trial court improperly excluded potential juror Thomas J. Schmitt during voir dire because he voiced some opposition to the death penalty. The court finds this claim was properly raised to the Ohio Supreme Court as Proposition of Law XV. Thus, the court will address the merits of the claim.

In *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 (1968), the Supreme Court invalidated a capital sentence when the trial court excused all jurors who expressed a conscientious objection to the death penalty. The Court reasoned that the proper inquiry was not whether a prospective juror opposed the death penalty generally, but whether the juror's religious, moral or philosophical beliefs would prevent him or her from following the court's instructions. *Id.* at 514 n.7 ("[E]ven a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the laws of the State.").

The Court revisited this issue after lower court confusion about how to apply the *Witherspoon* standard, determining:

> [A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or

> substantially impair the performance of his duties as a juror in accordance with his instruction and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. 38, 45 (1980); *see also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (affirming *Adams* standard). Given the subjective nature of any such determination, the Court cautioned that "deference must be paid to the trial judge who sees and hears the juror." *Witt*, 469 U.S. at 426.

During voir dire, the prosecutor questioned Mr. Schmitt regarding his views on capital punishment. After a lengthy discourse, the prosecutor questioned Mr. Schmitt as to whether he could follow the dictates of the law:

> Q: But if you are finiily convinced in your own mind you will fairly consider the imposition of death and will recommend it if it is proper in this case, you will tell us that, too, won't you?
>
> A: Well, I don't think I can ever say that anyone deserves the death penalty no matter what they have done.
>
> Q: So what you are saying if I understand you correctly, and don't let me put words in your mouth - regardless of what the evidence is, it doesn't make any difference, I mean it doesn't make any difference what the evidence is, is that what you are saying?
>
> A: Well, in a way.

> Q: And you are also saying under no circumstances could you put your religious morals and philosophical beliefs aside and recommend to this Court the defendant be put to death, right?
>
> A: I don't think I can do that.

(Y. D. Tr. 258-59.) Although defense counsel attempted to demonstrate that Mr. Schmitt could, indeed, follow the dictates of the law, the trial court ultimately excused Mr. Schmitt from the case.

Spisak argues that Mr. Schmitt's determination in response to defense counsel's questioning that he could follow the law is proof that he was improperly excused. The court disagrees. While Mr. Schmitt did affirmatively respond that he could follow the law, he also responded ambiguously to defense counsel's questions as to whether he could ever impose the death penalty. Coupled with the responses Mr. Schmitt provided to the prosecutor and the deference with which a habeas court must give to the trial Court, the court finds that Mr. Schmitt was not improperly excused from juror service. The Ohio Supreme Court did not act unreasonably when it denied this claim. Accordingly, Spisak's thirtieth ground for relief is not well-taken.

H. Ground for Relief Relating to Bias and Sympathy

Thirty-First Ground For Relief

In his thirty-first ground for relief, Spisak contends he was denied due process when the trial Court permitted the testimony of three state witnesses: (1) Clem Sharkey; (2) John Hardaway; and, (3) Kathleen Sheehan. The court notes this claim is not procedurally defaulted because Spisak raised it as Propositions of Law XXIV, XXV, and XXVI to the Ohio Supreme Court.

As stated above, a habeas court cannot grant relief solely on the basis of error in the admission of evidence. Review of a state Court's evidentiary ruling on federal habeas review is very limited. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990). As one court stated, "[e]rrors by a state court in the admission of evidence generally are not reviewable by a habeas court 'unless they so perniciously affect the prosecution of a criminal case as to deny the defendant the fundamental right to a fair trial." *Skaggs v. Parker*, 27 F.Supp.2d 952,985 (W.D. Ky. 1998) (quoting *Kelly v. Withrow*, F.3d 363,370 (6th Cir. 1994)); *see also Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988) (holding "errors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding") (citations omitted).

In this claim, Spisak maintains that the introduction of the testimony of Clem Sharkey, John Hardaway, and Kathleen Sheehan was irrelevant and served only to arouse the sympathy of the jurors prejudicing Spisak. While the court finds that some testimony was superfluous, most was relevant to the proceeding. Clem Sharkey, a friend and distant relative of Horace Rickerson testified that Reverend Rickerson told him he was to be on the Cleveland State University Campus on the day he was shot for purposes of establishing a deaf ministry, rather than to engage in homosexual activity, which Spisak alleged during trial. Additionally, the focal point of John Hardaway's testimony was to recreate the crime scene at which he was shot. Finally, the essence of Kathleen Sheehan's testimony was to establish that Timothy Sheehan left the house the morning he was murdered with his wallet, five credit cards, and fourteen dollars in cash. Any testimony these witnesses provided that was irrelevant to establishing the above facts does not constitute such egregious error so as to deny Spisak the right

to a fair trial. The Ohio Supreme Court acted reasonably in denying this claim. Consequently, the court finds Spisak's thirty-first claim is without merit.

I. Ground for Relief Relating to Ineffective Assistance of Counsel

Thirty-Second Ground For Relief

In this ground for relief, Spisak alleges ineffective assistance of counsel throughout the trial court proceeding. The court finds that this claim is not procedurally defaulted, as Spisak raised these claims to the Ohio Supreme Court on direct appeal as Propositions of Law II, XVII, LVII and LIY. Thus, the court will address Spisak's many sub-claims on the merits.

In this claim for relief, Spisak asserts the following sub-claims as instances of trial counsel's ineffectiveness:[26]

> **Pretrial Investigation and Preparation:**
>
> (A) Counsel failed to investigate the facts of the case; including but not limited to, the defense of insanity;
>
> (B) Counsel failed to interview individuals personally acquainted with Petitioner's bizarre and irrational behavior as manifested by Petitioner's actions;
>
> (C) Counsel failed to provide available collateral information to the mental health experts appointed in Petitioner's case and failed to properly interview them;

[26] The court has re-numbered the sub-claims to conveniently refer to them.

(D) Counsel failed to develop sufficient expertise or knowledge regarding the psychiatric issues and the defense of insanity;

(E) Counsel failed to collect all available records and background on Petitioner's psychological, social, sexual, and developmental history;

(F) Counsel failed to conduct a thorough pretrial investigation of sentencing phase issues and mitigating factors;

(G) Counsel failed to adequately and thoroughly investigate the facts of Petitioner's case in order to arrive at a coherent defense strategy to support the guilt phase defense presentation of insanity while not totally undermining the defense mitigation phase presentation;

Pretrial Motion Practice:

(H) Counsel failed to file a motion for change of venue;

(I) Counsel failed to attack the entry and search of Petitioner's house in which Petitioner was arrested on unrelated misdemeanor charges in which evidence was seized; failed to attack the search of the house in which the Petitioner was arrested and the accompanying search of Petitioner's belongings; failed to attack the search of the car in which the Petitioner was riding immediately prior to his arrest;

(J) Counsel failed to challenge by a Motion in Limine or any other way the prosecution's

stacking of multiple aggravating circumstances, specifically the nineteen specifications;

(K) Counsel failed to mount any meaningful attack on Ohio's death penalty statute;

Voir Dire:

(L) Forty-six jurors were passed for cause in the individual portion of voir dire. Trial counsel did not ask questions of thirty-two of these jurors;

(M) Only three jurors who were passed for cause in this individual phase were asked questions by counsel about the death penalty;

(N) Trial counsel failed, with one exception, to question jurors who actually sat to hear the case, about their attitudes on the death penalty in order to fonll the basis for the cause challenges against jurors who were so much in favor of the death penalty that they would always vote death in the event of a conviction;

(O) Three jurors from the pool were excluded because of their opposition to the death penalty. Defense counsel did not attempt to rehabilitate any of these jurors pursuant to *Wainwright v. Witt*, 469 U.S. 412 (1985);

(P) Counsel failed, with two exceptions, to question prospective jurors regarding the insanity defense and their attitudes towards psychiatrists and psychologists in order to exercise cause challenges against those who would not vote for or consider not-guilty by reason of insanity as a viable defense or who

would never vote in agreement with psychological testimony;

(Q) Counsel failed to question any jurors who sat with respect to what they knew about the case from an avalanche of pervasive and inflammatory pre-trial publicity, in order to build challenges for cause against those jurors who had formed adverse opinions against the Petitioner;

(R) Counsel failed to ask any questions at all to two jurors in either individual or group voir dire;

(S) Counsel failed to object to the numerous admonitions to the jury by the trial court and prosecutor that their death verdict would simply be a "recommendation;"

Trial:

(T) Counsel twice demeaned Petitioner in his opening statement by referring to him as a "demented," "twisted member of society;" (U) Counsel failed to object to the shackling of the Petitioner during jury views and the scenes of the various crimes and failed to request a cautionary instruction be given to the jury regarding the prejudicial effect of the shackling and that no adverse inferences should be drawn therefrom;

(V) Counsel failed to object to the introduction of numerous "other acts" of the Petitioner;

(W) Counsel failed to object to the introduction of autopsy evidence by a doctor who did not perform the autopsy;

(X) Counsel failed to object to improper and prejudicial cross-examination of the Petitioner;

(Y) Counsel failed to adequately prepare an opening statement, but rather presented a rambling discourse on the Petitioner's Nazi beliefs;

Mitigation:

(Z) Trial counsel made repeated references to the brutal circumstances of the killings and the accompanying pain to the families as "aggravated circumstances." As a matter of law, these are not aggravating circumstances;

Other:

(AA) Trial counsel erroneously advised the Petitioner to enter a no contest plea to the attempted murder of John Hardaway;

(Petition at 90-94.)

The court initially notes that many of these sub-claims have been raised as discreet claims elsewhere in the Petition. Because the court found no merit to those underlying claims, the court now finds that Spisak was not prejudiced by counsel's acts or failure to act in conjunction with those claims. Specifically, the court finds that sub-claims (I), (J), (K), (S), and (V) were raised as distinct grounds for relief in other claims in this Opinion. Thus, those sub-claims are without merit.

Additionally, a number of sub-claims are merely reassertions of Spisak's sixth and tenth grounds for relief. Sub-claims (A), (B), (C), (E), (F), (G), and (Z) were raised previously. The court will not, therefore, readdress them here.

As stated above, the Sixth Amendment dictates that a criminal conviction must arise from "an adversarial process, rather than the ex parte investigation and determination by the prosecutor." *Nix v. Williams*, 467 U.S. 431, 453 (1984). As such, a criminal defendant is entitled to more than mere appointment of counsel. Counsel's performance during a criminal trial must be sufficient to ensure a defendant's trial was fair. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To determine whether a criminal defendant received the meaningful representation the Sixth Amendment mandates, a reviewing court must submit counsel's performance to a two-pronged analysis. *Id.* at 687. First, the petitioner must demonstrate that counsel's errors were so egregious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the petitioner must show that he or she was prejudiced by counsel's errors. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

To successfully assert an ineffective assistance of counsel claim, a petitioner must point to specific errors in trial counsel's performance. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Thereafter, a reviewing court must subject the allegations to rigorous scrutiny, determining "whether, in light of all circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A reviewing court must strongly presume that counsel's conduct was reasonable and might be part of a trial strategy.

Id. at 689. When challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently re-weighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 694. A verdict "only weakly supported" would be more susceptible to influence of counsel error than one which is supported by an overwhelming record. *Id.* at 696.

Subjecting Spisak's remaining sub-claims to the above test, the court finds that some sub-claims do not allege specific instances of misconduct or how Spisak was prejudiced by them. Sub-claims (D) and (X) do not adequately articulate a claim. In sub-claim (D), Spisak baldly asserts that trial counsel "failed to develop sufficient expertise or knowledge regarding the psychiatric issues and the defense of insanity" without supporting this allegation by facts. Similarly, in sub-claim (X), Spisak asserts that trial counsel "failed to object to improper prejudicial cross-examination of the Petitioner" without citing instances in which counsel should have objected. Because Spisak has failed to point to specific errors in trial counsel's performance as required under *United States v. Cronic*, 466 U.S. 648, 666 (1984), these two sub-claims are without merit.

In sub-claims (O), (T), (U), and (Y), the court rejects Spisak's factual assertions and finds that counsel did not act objectively unreasonable pursuant to *Strickland.* In sub-claim (O), Spisak asserts that trial counsel did not attempt to rehabilitate three jurors who were excused for cause because they stated they could not, under any circumstances, sentence Spisak to the death penalty. One such instance is noted above in Spisak's thirtieth ground for relief in relation to juror Thomas Schmitt. As the court stated above, trial counsel did,

in fact, attempt to rehabilitate Juror Schmitt and objected to the trial court's dismissal of this juror. Although trial counsel did not object to the court's excusing two other prospective jurors, both indicated that they would not consider the death penalty under any circumstances although the law might require them to do so. (V.D. Tr. 578-79, 604.) As stated in claim thirty above, a juror may be excused for cause if he or she cannot put aside his or her moral, religious, or philosophical beliefs and follow the dictates of the law. *Wainwright v. Witt*, 469 U.S. 412,424 (1985). Because sub-claim (O) is partially factually incorrect and partially contradicted by law, the court finds it has no merit.

In sub-claims (T) and (Y), Spisak asserts that counsel demeaned him by referring to him during opening statements as "demented" and "twisted" and that counsel did not adequately prepare for opening statements. The court disagrees. While trial counsel did call Spisak demented and twisted in two instances during the opening statement, counsel did not demean Spisak by the use of such language but, instead, was attempting to demonstrate that Spisak was an insane individual whose views would ultimately offend the jury when he testified. Rather than presenting a "rambling discourse," as Spisak suggests, defense counsel told the jury that what they would hear from Spisak would offend them, but that "in spite of being shocked that they can say . . . I'm a juror and I'm going to be fair" (Tr. 152). Because trial counsel provided Spisak with a constitutionally sufficient opening argument, sub-claims (T) and (Y) are not well-taken.

Furthermore, Spisak fails to fully enlighten the court with all facts surrounding sub-claim (U). In that sub-claim, Spisak contends that trial counsel failed to object to the shackling of Spisak while on a jury view and failed to request an instruction that no adverse inferences be drawn from Spisak's shackling. Although the presumption of innocence

prevents a trial court from compelling a defendant to wear identifiable prison clothes during trial, *Estelle v. Williams*, 425 U.S. 501 (1976), Spisak's trial court did not require him to do so. Before trial, the jury went on a jury view of the Cleveland State University and other murder scenes. Spisak expressed his desire through counsel to be present during this trip. Although the trial court noted that Spisak would have to be shackled on this journey for security purposes, counsel stated that he had informed Spisak the possible prejudice he could face of by the jury seeing him in shackles and handcuffs but that Spisak pointedly *waived this right*. This waiver is noted on the record:

> The Court: Apparently Mr. Spisak wishes to visit the scene. The security requirements of the Sheriffs Department is that he be shackled and handcuffed, which is difficult to do sometimes because the jury might see this. The jury is going there, and Mr. Spisak is going there too, and there is the possibility the jury could in fact see him shackled. I am sure they are aware that he is incarcerated. What do you have to say?
>
> Mr. Shaughnessy: As to the defendant, Frank Spisak, expressed a wish to go on the jury view to be a part of any and all proceedings of which he has that right.
>
> There is no question he is in jail. I have explained to him that there could be some detrimental effects, I don't know what they will be factually, but being viewed in the shackles and handcuffs we specifically waive those. Everybody knows he's in jail. Everybody know he's going to be in shackles, and there is no problem here.

> We are not going to come back and complain if it does happen. If it comes to our attention somebody saw him, we are not going to object to that. I have specifically explained that to my client.

(Tr. 104-05.) Thus, Spisak specifically waived his right to assert any prejudice from the jury viewing him in shackles. More importantly, Spisak does not now contend that the jury actually did see Spisak while on the jury view. The court cannot presume prejudice without any factual support. Thus, sub-claim (U) is not well-taken.

In sub-claim (H), Spisak argues trial counsel was inadequate because counsel failed to file a change of venue motion. Spisak alleges, without support, that even though prospective juror Zayac "revealed there was gossiping about the case. . . [n]either trial counsel nor the court did anything to alleviate this problem." Petition at 91.

The Supreme Court determined in *Irvin v. Dowd*, 366 U.S. 717 (1961), that finding a jury totally ignorant of a case is difficult. In that case, the Court determined that:

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in a criminal case. To hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is sufficient to rebut the presumption or a prospective juror's impartiality would be to establish an impossible standard. It is

> sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722-23.

Following this precedent, the Sixth Circuit has held that it is sufficient if a juror who has formed an impression as to guilt or innocence from pre-trial publicity can put aside that impression and render a verdict based solely on the evidence. *Kelly v. Winthrow*, 25 F.3d 363, 368 (6th Cir. 1994), *cert. denied*, 513 U.S. 1061 (1994). Consequently, a petitioner must point to actual prejudice to succeed on a change of venue claim.

The court finds that this sub-claim fails as Spisak cannot demonstrate that counsel's actions were objectively unreasonable nor can he establish the prejudice requisite to obtain relief. While Spisak notes that there was some "general gossiping" about the case, he does not delineate any instances in which a juror stated he or she could not render a verdict based on the evidence proffered at trial. As such, sub-claim (H) is without merit.

In sub-claims (L), (M), (N), (P), (Q), and (R), Spisak asserts that counsel failed, on numerous occasions during voir dire, to question jurors regarding their views of particular topics, or to pose any questions to particular jurors. Once again, Spisak does not allege that counsel's failure to question jurors as to these specific issues resulted in prejudice. Spisak fails to make the critical nexus between the alleged unreasonable behavior, and the resulting prejudice to him. For example, although counsel may not have questioned some jurors regarding what information they learned from this case through the media, there is no indication that counsel did not obtain sufficient information through the court's or prosecution's questioning. Thus, it is impossible to

determine, based on Spisak's bare assertion, whether counsel's failure to question was unreasonable or whether Spisak was prejudiced thereby. Thus, Spisak has not articulated a claim for ineffective assistance of counsel pursuant to Strickland for these sub-claims. Accordingly, the court finds they are without merit.

Spisak's sub-claim (V) suffers from a similar defect. In that sub-claim, Spisak contends that trial counsel were ineffective for failing to object to the introduction of autopsy evidence by a physician who did not perform the autopsy. Spisak fails to supply the court with basic information about this claim, such as which doctor and what specific testimony is objectionable. Without providing the court with more specific information about the background of this sub-claim and the reasons for counsel's alleged ineffectiveness, i.e., counsel's unreasonable behavior and the resulting prejudice to Spisak, the court cannot find merit in this sub-claim.

Finally, Spisak alleges counsel erroneously advised him to enter a no contest plea to the attempted murder of John Hardaway. The court finds this claim fails under *Strickland.* Given the fact that Spisak previously told police about the details of each murder and attempted murder, and the fact that Mr. Hardaway was able to identify Spisak in a police lineup, counsel's advice was not objectively unreasonable. Consequently, the court finds sub-claim (AA) is without merit.

Because the court finds that none of Spisak's sub-claims possess merit, it consequently finds that the Ohio Supreme Court was not unreasonable in denying these claims on direct appeal. Accordingly, Spisak's thirty-second ground for relief is not well-taken.

J. Ground for Relief Relating to the Constitutionality of Ohio's Death Penalty

Thirty-Third Ground For Relief

Spisak argues in his thirty-third ground for relief that the Ohio death penalty is unconstitutional both facially and as applied. In raising this issue, Spisak has asserted that the Ohio death penalty scheme violates due process in thirteen separate sub-claims. Some of these claims are procedurally defaulted as they were not raised to the Ohio Supreme Court.[27] Other claims, however, were raised to the Ohio

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[27] Furthermore, Spisak does not allege cause or prejudice to excuse this procedural default. To be thorough, however, the court will address the merits of these defaulted sub-claims in summary fashion. These sub-claims assert the unconstitutionality of the Ohio death penalty statutes because:

(1) it is arbitrary as it allows for prosecutorial discretion in choosing which cases to seek a capital indictment. The United States Supreme Court rejected this argument under a similar death penalty statute and sanctioned the discretionary system. *Gregg v. Georgia*, 428 U.S. 153 (1976);

(2) it imposes a risk of death on those capital defendants who choose to exercise their right to trial. In *United States v . Jackson*, 390 U.S. 570, 582 (1968), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to trial. In that case, the court struck down the capital portions of a federal kidnapping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after trial." *State v. Buell*, 489 N.E.2d 795 (Ohio 1986). Consequently, the Ohio scheme comports with the constitutional mandate;

(3) it provides for a bifurcated system with the same jury serving at both phases of trial. Spisak points to no authority that would hold this provision of the Ohio death penalty constitutionally infirm. Furthermore, the bifurcated system long has been upheld as a system that has the desired effect of narrowing the class of death-eligible defendants. *Lockett v. Ohio*, 438 U.S. 586 (1978);

(4) the jury is instructed not to consider mercy or sympathy for the defendant in its decision. The Supreme Court held that a charge

Supreme Court as the LXII (62nd) and LXIV (64th) Propositions of Law. The court will address these claims individually.

Spisak first claims that the Ohio death penalty scheme violates the due process clause because one of the aggravating factors for capital felony murder merely repeats an element of the crime.[28] The Ohio death penalty comports with Supreme Court jurisprudence that requires a statutory scheme to limit the class of death-eligible defendants. Moreover, this "double counting" system was upheld in *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1987). *See also State v. Jenkins*, 473 N.E.2d 264 (Ohio 1984) (noting that under Ohio Rev. Code § 2929.04(A)(7) a state must not only prove that the defendant caused the death of another to establish the aggravating circumstance, but it also must prove that the defendant was the principal offender in the commission of the aggravated murder, or that the aggravated murder was committed with prior calculation and design.). This additional factor complies with the narrowing prerequisites set forth in *Lowenfield*.

Spisak also asserts that the Ohio scheme is unconstitutional because the aggravating circumstances are introduced during the guilt phase rather than the mitigation phase of trial. Under this system, Spisak argues, the jury

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instructing the jury to not be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was constitutionally sound as a reasonable juror would understand that this instruction was meant to limit the jury to weigh only the evidence before it. *California v. Brown*, 479 U.S. 538, 540 (1987).

[28] Spisak contends that one of the statutory aggravating circumstances, Ohio Rev. Code § 2929.04(A)(7), duplicates the statutory definition of felony murder, Ohio Rev. Code § 2903.01(B). This duplication, Spisak argues, demonstrates the failure of the Ohio statutory scheme to narrow the class of death-eligible defendants.

cannot make an individualized death penalty determination. The United States Supreme Court specifically upheld this type of system in *Walton v. Arizona*, 497 U.S. 639 (1990).[29]

Spisak next asserts the unconstitutionality of the Ohio death penalty because there is no specified standard of proof for finding mitigating factors. This argument is without merit, however, because there is no constitutional requirement that a death penalty scheme contain a particular standard of proof for the consideration of mitigating factors. *Walton*, 497 U.S. at 650; *Skaggs v. Parker*, 27 F.Supp.2d 952, 996-99 (W.D. Ky. 1998). Spisak also argues that the Ohio death penalty scheme violates due process because it fails to provide the sentencing authority with an option to impose a life sentence when it finds only aggravating circumstances exist. This argument also is without merit, however, as the Supreme Court rejected the identical argument in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

Spisak further takes issue with the burden of proof and production required in a capital conviction, alleging it

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[29] This aspect of the *Walton* holding is unaltered by the recent Supreme Court decision *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002). In that case, the Court partially overruled *Walton* because it found Walton irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a case in which the Court held that the Sixth Amendment does not permit a judge to impose a sentence that would exceed the maximum sentence to which the defendant would be exposed if punished pursuant to the facts found by the jury. Thus, because *Walton* found Arizona's capital sentencing constitutional even though it permitted a judge alone to find aggravating factors and impose a death sentence, the *Ring* Court overruled it. The Court limited its holding, however, overruling *Walton* only "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 122 S.Ct. at 2430. Consequently, the portion of *Walton* finding it permissible for the prosecution to present both the initial opening argument and last closing argument remains intact.

unconstitutional to both require a defendant to establish a mitigating factor by a preponderance of evidence and, conversely, not require the state to prove the absence of mitigating factors. As stated above, the Supreme Court rejected the identical arguments in *Walton v. Arizona*, 497 U.S. at 649-50.[30] Thus, both arguments must fail.

Spisak next contends that the Ohio death penalty statutes are unconstitutional because they fail to require a finding that death is the only appropriate remedy before imposing a capital sentence. Additionally, Spisak asserts the Ohio scheme is constitutionally infirm because it does not provide an adequate proportionality review as it compares a death-sentenced defendant with others who received capital punishment, rather than a comparison with life-sentenced individuals. Spisak's claim regarding an appropriate sentence must fail because no such constitutional mandate exists. Moreover, the Ohio scheme provides for an appropriateness review on direct appeal. Finally, the Supreme Court has determined that a comparative proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37 (1984). Moreover, the Sixth Circuit held in a recent opinion that, because "proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison." *Buell v. Mitchell*, 274 F.3d 337, 369 (6th Cir. 2001).

Spisak also argues that the death penalty is not the least restrictive means of effectuating deterrence. The Supreme Court addressed this exact point in Gregg v. Georgia, 428 U.S. 153 (1976). Noting that imposing criminal punishment is a legislative responsibility, the Court limited its own ability to "require the legislature to select the least severe penalty possible." *Id.* at 175.

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[30] This portion of Walton also remains unaltered by the Ring holding.

Finally, Spisak contends that the death penalty in Ohio is imposed in a racially discriminatory manner, alleging those who are racial minorities or who kill whites are more likely to receive the death penalty. Pursuant to *McClesky v. Kemp*, 481 U.S. 279 (1987), a capital defendant cannot evade a death sentence merely by demonstrating the statistical disparity of capital defendants or victims of a particular race. Instead, the capital defendant must prove that the decision maker in his or her individual case acted with a discriminatory purpose, and that such actions had a discriminatory effect on the proceeding. *Id.* at 292. As Spisak has not asserted discrimination occurred during his sentencing, this claim must fail.

Because the court finds that none of Spisak's sub-claims are meritorious, it concludes that the Ohio Supreme Court did not act unreasonably pursuant to 28 U.S.C. § 2254(d). Accordingly, Spisak's thirty-third ground for relief is not well-taken.

VII. CONCLUSION

Recently, the Sixth Circuit found that a district court need not wait until a petitioner moves for a Certificate of Appealability (hereinafter "COA") before issuing a COA for claims raised in the petition. *Castro v. United States*, 310 F.3d 900 (6th Cir. 2002). There, the court reasoned that, because a district court that has recently denied a writ of habeas corpus will have "an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when [it] denies the initial petition," it stands to reason that the proper time to determine whether to grant a COA is at the conclusion of the opinion granting or denying the writ. *Id.* at 901 (internal quotation marks and citations omitted).

Furthermore, in two other recent decisions, the Sixth Circuit determined that neither a blanket grant nor a blanket denial of a COA is an appropriate means by which to conclude a capital habeas case as it "undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability." *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court's analysis of claims). Thus, in concluding this Opinion, it is now appropriate to determine whether to grant a COA as to any of the claims the petitioner presented in his petition pursuant to 28 U.S.C. § 2253.

That statute states in relevant part:

> (c)(l) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court
>
> ***
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDP A statutes is that the petitioner now must demonstrate he was

denied a *constitutional* right, rather than the federal right that was required prior to the AEDP A's enactment.

The United States Supreme Court interpreted the significance of the revision between the pre- and post-AEDPA versions of the statute in *Slack v. McDaniel*, 529 U.S. 473 (2000). In that case, the Court held that § 2253 was a codification of the standard it set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), but for the substitution of the word "constitutional" for "federal" in the statute. *Id.* at 483. Thus, the Court determined that:

> "[t]o obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were '"adequate to deserve encouragement to proceed further.'"

Id. at 483-4 (quoting *Barefoot*, 463 U.S. at 893 n.4).

The Court went on to distinguish the analysis a habeas court must perform depending upon its finding concerning the defaulted status of the claim. If the claim is not procedurally defaulted, then a habeas court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id.* at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined procedurally defaulted. In those instances, the Court opined, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of

reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (emphasis supplied).

After taking the above standard into consideration, the court certifies all or part of thirteen (13) of Spisak's thirty-three (33) claims. The court's reasoning is set forth below.

Initially, the court certifies claims one and two for appeal (exclusion of Dr. Markey's testimony during trial). While the court found that the trial court properly excluded this testimony based on Dr. Markey's responses, a reasonable jurist could conclude to the contrary. Dr. Markey's response to the prosecutor's questions were, sometimes, ambiguous, such as when he stated that Spisak could "at times control [his impulse to kill, but] at other times he would decide that he didn't need to control it." (Tr. 1992.) While it appears that Dr. Markey is stating that Spisak was able to control his own conduct, a fact that would prevent him from successfully asserting an insanity defense under Ohio law, a jurist of reason might conclude that, based on the ambivalence apparent in portions of Dr. Markey's testimony, the trial court should have permitted the jury to determine its weight and credibility. Because the court finds claims one and two merit a COA, it necessarily finds that claim four, the trial court's failure to instruct on insanity, should also be certified for appeal.

The court will not issue a COA for Spisak's third claim for relief (trial court restricted his right to testify about his religious beliefs). The court finds, as it did in its Opinion, that a review of the trial transcript reveals that the trial court did not place unreasonable limits on Spisak's testimony concerning his religious beliefs. Because no reasonable jurist would debate the court's factual conclusion based on the record, the court will not issue a COA for this claim.

The court will grant a COA, however, for Spisak's fifth claim for relief (trial court's failure to merge aggravating circumstances specifications). While the court concluded that, pursuant to United States Supreme Court precedent, the trial court's duplication of aggravating circumstances in its charge to the jury was harmless error, a jurist of reason might conclude that the misleadingly expansive list of aggravating factors influenced the jury's decision to impose death. Thus, the court will issue a COA for this claim.

Claims six, ten, thirteen, fifteen, sixteen, eighteen, nineteen, and thirty-two all allege ineffective assistance of counsel. The court finds that some merit a COA, while others do not. The court issues a COA for claim six (ineffective assistance of counsel during closing argument in mitigation). Although the court found that this case was factually distinguishable from *Rickman v. Bell*, 131 F .3d 1150 (6th Cir. 1997), a reasonable jurist might find that defense counsel's use of disparaging and, at times, demeaning comments about Spisak were objectively unreasonable and prejudicial. Claim ten also alleges ineffective assistance during various aspects of the mitigation phase of trial. The court finds, as it did in the Opinion, that sub-claims (1), (2), (4), (5), and (6) are procedurally defaulted under *State v. Perry*, 226 N.E.2d 104 (Ohio 1967). As no reasonable jurist would debate the defaulted status of those sub-claims, the court wm not issue a COA for them. The court will issue a COA for the remaining sub-claims, however. Although the court found no indicia of defense counsel's unpreparedness, a jurist of reason might find otherwise. Thus, the court issues a COA for sub-claims (3), (7), and (8) of Spisak's tenth claim for relief. The court does not issue a COA for sub-claim (9) (failure to object to prosecutorial misconduct during mitigation) because the court finds that no reasonable jurist would find that the prosecution's cross-examination of Dr.

McPherson was an attempt to introduce a non-statutory aggravating factor.

The court will not issue a COA for claim thirteen (ineffective assistance of appellate counsel). As the court stated in its Opinion, Spisak cannot satisfy the prejudice prong of the *Strickland* analysis when he alleges ineffective assistance for initial appellate counsel's decision to bring only one claim on appeal. Because the Ohio Supreme Court heard sixty-four (64) claims when Spisak appealed the Eighth District's decision, Spisak cannot demonstrate that initial appellate counsel's failures prejudiced the outcome of his direct appeal. The court will not, moreover, issue a COA as to claims fifteen and sixteen (the Eighth District Court of Appeals caused ineffective assistance of counsel when it refused to hear subsequent appellate counsel's supplemental arguments). Given the fact that Spisak had obtained representation during his initial appeal to that court, the court finds the Court of Appeals may not be held accountable for initial counsel's failure to raise additional claims or its decision to adhere to its procedural rules. The court also finds that Spisak's eighteenth and nineteenth grounds for relief (ineffective assistance of counsel for failure to move to exclude evidence obtained in Ronald Reddish's apartment) do not merit a COA. Because Spisak admitted to the murders during his trial testimony, he is hard pressed to demonstrate that counsel's failure to object to the introduction of this evidence prejudiced him. For similar reasons, and because a habeas court cannot typically recognize Fourth Amendment search and seizure claims, the court also denies a COA for Spisak's seventeenth ground for relief.

Spisak's final ineffective assistance of counsel claim, claim thirty-two, alleges that counsel were ineffective on numerous occasions during trial. The court grants a COA as to some, but not all, of these sub-claims. First, the court will

not grant a COA as to sub-claims (A), (B), (C), (E), (F), (G), and (Z) because they are merely duplicative of Spisak's sixth and tenth grounds for relief. The court also denies a COA for claims (D), (L), (M), (N), (P), (Q), (R), (V), (X), and (W) because, as stated in the Opinion, the court finds these claims neither set forth specifically how counsel was objectively unreasonable nor how this conduct prejudiced the proceedings. The court will not grant a COA as to sub-claims (I), (K), (O), and (S) for the reasons set forth in the underlying claims for relief that were the impetus for Spisak's ineffective assistance of counsel claim.

Of the remaining sub-claims, the court finds that jurists of reason would debate the court's decision and, thus, that they merit a COA. First, in sub-claim (H), Spisak argues that trial counsel were ineffective for failing to move for a change of venue. While the court determined that Spisak provided no indicia of media influence on the jury, a jurist of reason might conclude that, due to the extensive publicity the case engendered, trial counsel should have moved to change venue. In sub-claim (J), Spisak asserts that the prosecution's stacking of nineteen specifications swayed the jury against him. For the reasons stated in the court's decision to grant a COA as to Spisak's fifth claim for relief, the court also grants a COA as to sub-claim (J). In sub-claims (T) and (Y), Spisak asserts that counsel was ineffective for calling him "demented" and "twisted" in opening arguments. For the reasons set forth in the COA analysis relating to the sixth ground for relief, the court grants a COA for sub-claims (T) and (Y).

Alternatively, the court finds that sub-claims (U) and (AA) do not merit a COA. In sub-claim (U), the court finds that jurists of reason would not debate, as stated in the Opinion, that Spisak specifically waived his right to be seen by the jury in shackles. Thus, Spisak cannot now demonstrate

the counsel's failure to object to his shackling was objectively unreasonable or prejudiced him. Finally, the court will not grant a COA as to sub-claim (AA), that counsel advised Spisak to plead no contest to the attempted murder of John Hardaway, because Hardaway was able to identify him as the perpetrator.

The court grants a COA as to Spisak's seventh claim for relief. While the court believes that *Jones v. United States*, 527 U.S. 373 (1999), is dispositive of the issue before it, a jurist of reason might read Spisak's seventh claim more expansively. Because such a reading might fall under the purview of *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), the court will grant a COA on this issue.

The court will not grant a COA, however, on numerous claims which occur almost pro forma in a capital habeas petition but are routinely denied. Accordingly, the court will not grant a COA as to claims eight (trial court improperly admonished the jury not to consider sympathy or prejudice), fourteen (failure to maintain a complete record), twenty-seven (admission of gruesome photographs), twenty-nine (trial court instructed the jury that its verdict was only a "recommendation"), and thirty-three (Ohio death penalty unconstitutional).

The court also will not grant a COA as to Spisak's ninth ground for relief (trial court improperly instructed on aggravating factors) because, as stated in the Opinion, when the instruction is read in context, no reasonable jurist would conclude that the jury would find that it could consider non-statutory aggravating factors.

Spisak's eleventh, twelfth, twenty-third, twenty-forth, twenty-fifth, and twenty-eighth grounds for relief all allege prosecutorial misconduct. The court will issue a COA as to Spisak's eleventh claim (introduction of Murphy testimony)

because, although it found that any error resulting from Murphy's testimony was hanllless, a reasonable jurist may not so find. The court also finds claim twelve and twenty-three (prosecutorial comments) merits a COA because, although it did not find that various comments the prosecutor made had a cumulative adverse effect on the trial, a reasonable jurist could conclude otherwise.

Alternatively, the court finds that claims twenty- four (prosecutor provided unsworn testimony), twenty-five (prosecutor "testified" during trial), and twenty-eight (prosecutor commented on petitioner's post-arrest silence) are not debatable among reasonable jurists because the court finds them to be factually inaccurate after a review of the record. Accordingly, it will not issue a COA for them.

The court will issue a COA for claim twenty-six (trial court improperly admitted excluded evidence). While the court finds this error to be harmless, a jurist of reason might conclude that the inclusion of this evidence somehow influenced the jury. Additionally, the court will issue a COA for claim thirty-one (trial court improperly admitted testimony of Clem Sharkey, John Hardaway, and Kathleen Sheehan). While the court found in its Opinion that much of their testimony was relevant to proving the state's case, a reasonable jurist could find that it had a prejudicial effect on the jury. Finally, the court denies a COA as to claims twenty and twenty one (trial court erred when it admitted numerous items unrelated to the crime), twenty-two (trial court erred when it admitted testimony regarding various uncharged acts of violence) because this evidence was relevant to proving the state's case. The court also denies a COA as to Spisak's thirtieth claim for relief (trial court erred in excluding prospective juror Schmitt from the jury) because Schmitt unequivocally indicated he could not vote for the death penalty under any circumstances. Thus, no jurist of reason

would find that the trial court properly excluded him from the venire.

For the reasons stated in this opinion, this court finds that none of the claims asserted in Spisak's Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254 are well-taken. Accordingly, Spisak's request for habeas corpus relief is denied and his Petition is hereby dismissed.

The court hereby issues a certificate of appealability pursuant to 28 U.S.C. §2253(c) as set forth in the above certificate of appealability analysis.

IT IS SO ORDERED.

/s/SOLOMON OLIVER, JR.

UNITED STATES DISTRICT JUDGE

April 18, 2003

APPENDIX D

LEXSEE 521 NE2D 800

THE STATE OF OHIO, APPELLEE,

v.

SPISAK, APPELLANT

No. 86-1099

Supreme Court of Ohio

36 Ohio St. 3d 80; 521 N.E.2d 800; 1988 Ohio LEXIS 85

April 13, 1988, Decided

PRIOR HISTORY: [***1]

APPEAL from the Court of Appeals for Cuyahoga County.

On February 1, 1982, the body of the Reverend Horace T. Rickerson was discovered by a fellow student on the floor of a restroom on the Cleveland State University campus. Rickerson had been shot seven times by an assailant from a distance of more than eighteen inches. Four spent bullet casings were recovered from the scene.

On the evening of June 4, 1982, John Hardaway was shot seven times while waiting for an RTA train at the West 117th Rapid Station in Cleveland. He observed a man walking up the platform steps and had turned away when the man opened fire on him. Hardaway survived the shooting, and was later able to identify his assailant as the appellant, Frank G. Spisak. Three pellets and seven shell casings were recovered from the scene.

At approximately 5:00 p.m. on August 9, 1982, Coletta Dartt, an employee of Cleveland State University, left her office to use the restroom. Upon exiting the stall, she encountered the appellant, holding a gun, who ordered her back into the stall. Instead, Dartt shoved appellant out of the way and ran down the hallway. Appellant shot at her, but missed. A pellet was later [***2] removed from a wall in the hallway. Dartt identified the appellant as her assailant.

On August 27, 1982, the body of Timothy Sheehan, an employee of Cleveland State University, was discovered in a restroom at the university by a security guard. The guard had been searching for Sheehan after his office reported that he had failed to answer his beeper page. Sheehan had been shot four times, and two pellets were retrieved from the scene.

On the morning of August 30, 1982, the body of a young student, Brian Warford, was discovered in a bus shelter on the campus of Cleveland State University. Warford died from a single gunshot wound to the head, although five spent .22 caliber casings were recovered from the scene.

On September 4, 1982, Cleveland police answered a call that a man was firing shots from a window at 1367 East 53rd Street. The police were directed to appellant's apartment and appellant, after admitting he had fired one shot, invited the officers inside. A shotgun and a .22 caliber automatic pistol were observed in the room. Appellant made a suspicious move toward the couch but was stopped by one of the officers who discovered a loaded .38 caliber handgun and a [***3] two-shot derringer under the couch cushions. Appellant was arrested for possession of unregistered handguns and discharging firearms within city limits, but was later released on bond. The weapons, however, were confiscated. Early the next day, an anonymous caller told police that the confiscated weapons had been used in the

Cleveland State University shootings. Ballistics tests confirmed the tip. A warrant was obtained, and the police returned to Spisak's apartment, confiscating several items including newspaper clippings of the homicides and Nazi-White Power paraphernalia. Appellant was later arrested, hiding in the basement of a friend's house. During a brief search of appellant's suitcase at the scene, police discovered the beeper paper belonging to Sheehan.

Appellant later admitted to shooting Rickerson for allegedly making a homosexual advance toward him; to killing Sheehan as a possible witness to the Rickerson shooting; to killing Warford while on a "hunting party" looking for a black person to kill; and, finally, to shooting at Dartt and to shooting Hardaway. He also told police he had replaced the barrel of the .22 caliber handgun in order to conceal the murder [***4] weapon.

Appellant was brought to trial under an eight-count indictment containing twenty specifications, including the aggravated murders of Rickerson, Sheehan and Warford and appurtenant death specifications. Appellant pleaded not guilty and not guilty by reason of insanity, claiming to be a follower of Adolf Hitler. He was found to have been competent, however, at the time of the acts, and the jury returned guilty verdicts on all counts and specifications, except the alleged aggravated robbery of Warford.

Following the mitigation hearing, the jury recommended that the sentence of death be imposed. In a separate opinion, the trial court concurred, imposing the death sentence. Appellant was also sentenced to terms of seven to twenty-five years on each conviction of attempted murder and aggravated robbery.

The court of appeals modified the judgment of the trial court, holding that appellant should have been convicted

of only one of the two counts of the aggravated murder of Timothy Sheehan and affirmed as modified. On March 6, 1985, this court remanded the cause to the court of appeals for supplementation of the record with certain hearing requests. The court of appeals [***5] considered the supplemented documents and re-affirmed its earlier decision. The cause was remanded a second time by this court with instructions to consider the additional arguments raised by the State Public Defender's Office, which had been appointed to represent the appellant while the first appeal was pending. The court of appeals considered those arguments and again affirmed the judgment of the trial court, finding the sentence of death to be appropriate in the case.

The cause is now before this court upon an appeal as of right.

DISPOSITION:

Judgment affirmed.

COUNSEL:

John T. Corrigan, prosecuting attorney, and Patricia A. Cleary, for appellee.

Randall M. Dana, public defender, David C. Stebbins, Randall L. Porter, Richard J. Vickers and Kathleen A. McGarry, for appellant.

JUDGES:

MOYER, C.J., SWEENEY, WHITESIDE, HOLMES and H. BROWN, JJ., concur. DOUGLAS and WRIGHT, JJ., concur in judgment only. WHITESIDE, J., of the Tenth Appellate District, sitting for LOCHER, J.

PER CURIAM

OPINION:

[*82] [**801] Pursuant to R.C. 2929.05(A), this court is required to review all cases in which the sentence of death has been imposed in the same manner in which we [***6] review other criminal cases and, in addition, to independently weigh the aggravating circumstances against the mitigating factors adduced at trial, and determine whether the sentence of death is appropriate in the case at bar. *State v. Maurer* (1984), 15 Ohio St. 3d 239, 15 OBR 379, 473 N.E. 2d 768. However, we are not required to consume limited judicial resources writing opinions which [**802] analyze time-worn legal arguments raised in a multiplicity of printed pages. n1 *State v. Poindexter* (1988), 36 Ohio St. 3d 1, 520 N.E. 2d 568. With these parameters in mind, we have reviewed each of appellant's sixty-four propositions of law and find them to be without merit. We affirm the judgment of the court of appeals and uphold appellant's sentence of death.

> n1 Appellant's merit brief, reply brief and attached appendix filed in this court comprise over nine hundred pages, all of which supplement a substantial, but average-sized, record of the proceedings in the lower courts. Although we do not presume to impose an arbitrary page limit on briefs in appeals from a sentence of death, we encourage the submission of concise, at least colorable, legal arguments, and conservative duplication of a record which we intend to exhaustively review on our own.

[***7]

In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four, appellant raises arguments which have previously been raised and rejected in the following cases: *State v. Jenkins* (1984), 15 Ohio St. 3d

164, 15 OBR 311, 473 N.E. 2d 264, *certiorari denied* (1985), 472 U.S. 1032; *Maurer, supra; State v. Buell* (1986), 22 Ohio St. 3d 124, 22 OBR 203, 489 N.E. 2d 795, *certiorari denied* (1986), 479 U.S. , 93 L. Ed. 2d 165; *State v. Williams* (1986), 23 Ohio St. 3d 16, 23 OBR 13, 490 N.E. 2d 906, *certiorari denied* (1987), 480 U.S. , 94 L. Ed. 2d 699; and *State v. Steffen* (1987), 31 Ohio St. 3d 111, 31 OBR 273, 509 N.E. 2d 383.

In propositions of law two through eight, ten through fifteen, seventeen, eighteen, twenty-one, twenty-two, twenty-four through thirty-six, thirty-eight through forty-one, forty-three through forty-seven, forty-nine, fifty-one through fifty-three, fifty-seven through sixty-one, and sixty-three, appellant raises arguments which we find to be not well-taken on the basis of our review of the record in light of the following authorities: *Maurer, supra; Donnelly v. DeChristoforo* (1974), [***8] 416 8 U.S. 637; *Darden v. Wainwright* (1986), 477 U.S. 168; *Strickland v. Washington* (1984), 466 U.S. 668; *Evitts v. Lucey* (1985), 469 U.S. 387; *State v. Smith* (1985), 17 Ohio St. 3d 98, 17 OBR 219, 477 N.E. 2d 1128; *State v. Lytle* (1976), 48 Ohio St. 2d 391, 2 O.O. 3d 495, 358 N.E. 2d 623; *State v. Staten* (1969), 18 Ohio St. 2d 13, [*83] 47 O.O. 2d 82, 247 N.E. 2d 293; *State v. Pi Kappa Alpha Fraternity* (1986), 23 Ohio St. 3d 141, 23 OBR 295, 491 N.E. 2d 1129 (distinguished); *Payton v. New York* (1980), 445 U.S. 573 (distinguished); *Rawlings v. Kentucky* (1980), 448 U.S. 98; *State v. Rogers* (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E. 2d 52, paragraph one of the syllabus (Rogers II), *reversed on other grounds* (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581; *Buell, supra; Wainwright v. Witt* (1985), 469 U.S. 412; *State v. Rogers* (1985), 17 Ohio St. 3d 174, 17 OBR 414, 478 N.E. 2d 984, paragraph three of the syllabus (Rogers I), *reversed on other grounds* (1987), 32 Ohio St. 3d 70, 512 N.E. 2d 581; *State v. Williams* (1983), 6 Ohio St. 3d 281, 6 OBR 345, 452 N.E.

[***9] 2d 1323; *State v. Williams* (1986), *supra; State v. Byrd* (1987), 32 Ohio St. 3d 79, 512 N.E. 2d 611; *State v. Kidder* (1987), 32 Ohio St. 3d 279, 513 N.E. 2d 311; *Illinois v. Allen* (1970), 397 U.S. 337; *State v. White* (1968), 15 Ohio St. 2d 146, 44 O.O. 2d 132, 239 N.E. 2d 65, paragraph two of the syllabus (distinguished); Evid R. 404(B); *State v. Spikes* (1981), 67 Ohio St. 2d 405, 21 O.O. 3d 254, 423 N.E. 2d 1123; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, 24 O.O. 3d 316, 436 N.E. 2d 1001; *State v. Morales* (1987), 32 Ohio St. 3d 252, 513 N.E. 2d 267; *Maurer, supra,* paragraph seven of the syllabus; *State v. Graven* (1977), 52 Ohio St. 2d 112, 6 O.O. 3d 334, 369 N.E. 2d 1205; *State v. Adams* (1980), 62 Ohio St. 2d 151, 16 O.O. 3d 169, 404 N.E. 2d 144; *State v. Thompson* (1981), 66 Ohio St. 2d 496, 20 O.O. 3d 411, 422 N.E. 2d 855 (distinguished); *State v. Mann* (1985), 19 Ohio St. 3d 34, 19 OBR 28, 482 N.E. 2d 592; *State v. Ferguson* (1983), 5 Ohio St. 3d 160, 5 OBR 380, 450 N.E. 2d 265; *Estelle v. Smith* (1981), 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d [***10] [**803] 359; *Steffen, supra;* R.C. 2945.39(D); *Doyle v. Ohio* (1976), 426 U.S. 610 (distinguished); *Wainwright v. Greenfield* (1986), 474 U.S. 284 (distinguished); *State v. Fanning* (1982), 1 Ohio St. 3d 19, 1 OBR 57, 437 N.E. 2d 583; *Carter v. Kentucky* (1980), 450 U.S. 288 (distinguished); *State v. Price* (1979), 60 Ohio St. 2d 136, 14 O.O. 3d 379, 398 N.E. 2d 772, paragraph four of the syllabus; *State v. DeMarco* (1987), 31 Ohio St. 3d 191, 31 OBR 390, 509 N.E. 2d 1257 (distinguished); *Chapman v. California* (1967), 386 U.S. 18.

Finally, in propositions of law nine, sixteen, twenty, twenty-three, thirty-seven, forty-two, forty-eight and fifty, appellant raises arguments which we find to be wholly without support in the record. In addition, appellant neither timely objected to nor raised below the errors alleged in propositions of law twenty-one, twenty-two, twenty-nine, thirty, thirty-nine, fifty-one, fifty-two and fifty-three, and has

thus waived them: *State v. Williams* (1977), 51 Ohio St. 2d 112, 5 O.O. 3d 98, 364 N.E. 2d 1364, vacated in part on other grounds (1978), 438 U.S. 911; *Schade, supra; Fanning,* [***11] *supra; State v. Scott* (1986), 26 Ohio St. 3d 92, 26 OBR 79, 497 N.E. 2d 55. Our review of the record in each instance has failed to establish the presence of plain error. State v. Long (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 78, 372 N.E. 2d 804, paragraph three of the syllabus; *Scott, supra,* at 103, 26 OBR at 88-89, 497 N.E. 2d at 64.

In summary, we find no merit in the propositions of law raised by appellant relevant to the proceedings below or to the constitutionality of this state's death penalty scheme. Proceeding to our independent weighing of the aggravating circumstances and mitigating factors presented herein, we note that appellant's three aggravated murder convictions specify fifteen separate aggravating circumstances [*84] under R.C. 2929.04. However, as pointed out by appellant in his first proposition of law, for purposes of sentencing the doctrine of merger applies herein. *State v. Jenkins, supra,* paragraph five of the syllabus. Each aggravated murder count should thus contain only one specification that appellant's acts were part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. R.C. [***12] 2929.04(A)(5). Similarly, specifications pursuant to R.C. 2929.04(A)(3) (escaping detection, apprehension, trial or punishment) and R.C. 2929.04(A)(7) (felony murder) are duplicative of and thus merge with R.C. 2929.04(A)(5), since these aggravating circumstances arise from the same indivisible course of conduct. Although the court of appeals did not apply the merger doctrine below, we have determined that the jury's consideration of the duplicative aggravating circumstances during sentencing did not affect their verdict. *Jenkins, supra.* Furthermore, we have independently determined that the remaining aggravating

circumstances outweigh the mitigating factors beyond a reasonable doubt.

Of the mitigating factors specified in R.C. 2929.04(B), appellant relied solely on his allegation that he lacked, due to a mental disease or defect, substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the law at the time of committing the offenses. R.C. 2929.04(B)(3). Although there was testimony that appellant had characteristics of borderline and schizotypal personality disorders, the bulk of the testimony, from both defense and rebuttal expert witnesses, [***13] established that appellant was sane at the time of the acts, that he could have refrained from committing them, had he so chosen, and that he understood the nature of his acts but elected to carry them out anyway.

Appellant admitted to being the principal offender in three murders and two attempted murders. He did not have a significant history of prior criminal convictions or juvenile adjudications, nor was his age a factor. He was not under duress, coercion or strong provocation at the time of the crimes. His victims neither facilitated nor induced the offenses. Nothing in the nature and circumstances of these deliberate [**804] murders tempers the gravity of the offenses. We concur with the jury and lower courts that the balance of these factors lies heavily, and beyond reasonable doubt, on the side of the aggravating circumstances of which the appellant was convicted.

Finally, considering all our prior decisions affirming a sentence of death, appellant's sentence was not arbitrarily, freakishly or capriciously applied, and is not disproportionate to such prior sentences. Although the majority of such decisions involved a single victim, in *State v. Brooks* [***14] (1986), 25 Ohio St. 3d 144, 25 OBR 190, 495 N.E. 2d 407, we affirmed a death sentence involving the murder of

defendant's three sons. In the case sub judice, the sentence of death was properly imposed upon appellant.

Accordingly, the judgment of the court of appeals is hereby affirmed.

Judgment Affirmed.

CONCUR:

DOUGLAS, J., concurring. I write separately for the sole purpose of expressing my view that the doctrine of waiver is not applicable to cases where the penalty of death has been imposed.

APPENDIX E

TRIAL TRANSCRIPT OF JURY SENTENCING INSTRUCTION

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.
On behalf of the Defendant.

Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

Volume 8 of 10

[2959]

CHARGE OF THE COURT

SWEENEY, J.:

Members of the jury, you have heard the evidence and the arguments of counsel. It is now my duty to instruct you on the law which applies in this case. The Court and jury have separate functions. You decide the disputed facts and the Court provides you with the instructions of law.

It is your sworn duty to accept these instructions and to apply the law as it is now given to you by me. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

Now, at the trial of this case, which was concluded Friday, July 5, 19 83, you heard the evidence, testimony and the arguments of counsel as to the aggravating circumstances relating to four separate counts of aggravated murder.

Now, in this sentencing hearing, you heard additional evidence, testimony and the arguments of counsel concerning factors in mitigation and also concerning the aggravating [2960] circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing.

Now, evidence, what is evidence? Evidence is all the testimony received from witnesses during the course of trial -- during the course of this hearing and the exhibits admitted into evidence by the Court.

Now, evidence may be direct, circumstantial, or both.

Direct evidence. Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. And it also includes the exhibits received into evidence during the course of the trial by the Court.

Now, circumstantial evidence. Evidence may also be used to prove a fact by inference. This is what is referred to as circumstantial evidence. Circumstantial evidence is the proof of facts by direct evidence from which you may infer other reasonable facts or conclusions.

Now, in the absence of direct evidence, circumstantial evidence by itself will justify a finding of guilty -- strike that.

[2961] Now, where the evidence is both direct and circumstantial -- approach the Bench a second.

(Thereupon, the following proceedings were had at sidebar on the record out of the hearing of the jury:)

THE COURT: They made no objection, and I will continue to read the same charge of circumstantial evidence.

(Thereupon, the following proceedings were had in open court:)

THE COURT: Circumstantial evidence. Evidence may also be used to prove a fact by inference. This is what is referred to as circumstantial evidence.

Circumstantial evidence is the proof of facts by direct evidence from which you may infer other reasonable facts or conclusions.

Now, in the absence of direct evidence, circumstantial evidence, by itself, will justify a finding of guilty if the circumstances are entirely consistent with the defendant's guilt, are wholly inconsistent with any possible theory of the

defendant's innocence, and are so convincing as to exclude [2962] a reasonable doubt of a defendant's guilt.

Now, where the evidence is both direct and circumstantial, the combination of the two must satisfy you of the defendant is guilt beyond a reasonable doubt.

Now, you may not make one inference from another inference. However, you may draw more than one inference from the same facts or circumstances.

If the circumstances create inferences that are equally consistent with either innocence or guilt, such inferences must be resolved in favor of a defendant's innocence.

Now, the evidence does not include the opening statements, or the closing arguments of counsel. The opening statements and the closing arguments of counsel are designed to assist you, but they are not evidence.

Statements and answers that were stricken by the Court, or which you were instructed to disregard are not evidence and must be treated as though you never heard them.

You must not speculate as to why the Court sustained the objection to any question on what the answer to such question might have [2963] been. You must not draw any inference or speculate on the truth of any suggestion included in a question that was not answered.

Now, credibility. You are the sole judges of the acts, the credibility of the witnesses, and the weight of the evidence.

To weigh the evidence, you must consider the credibility of the witnesses. To do this, you will apply the tests of truthfulness which you apply in your daily lives. These tests include: The appearance of each witness upon the

witness stand; the witness's manner of testifying; the reasonableness of the testimony; the opportunity the witness had to see, to hear, and to know the things concerning which the witness testified; the witness's accuracy of memory; the witness's motivation; that is, what did a particular witness have to gain or lose by testifying as he or she did; the witness's frankness, or lack of it; intelligence, interest and bias, if any, together with all the facts and circumstances surrounding the testimony.

Applying these tests, you will assign [2964] to the testimony of each witness such weight as you deem proper.

Now, you are not required to believe the testimony of any witness simply because he was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief, and what testimony is not worthy of belief. Now, expert witnesses.

Generally, a witness may not express an opinion. However, one who follows a profession or special line of work may express his opinion because of his education, knowledge, and experience. Such testimony is admitted for whatever assistance it may provide to help you to arrive at a just verdict.

Now, questions have been asked in which the expert witness was permitted to assume that certain facts were true and to give an opinion based upon such assumption. You may determine whether the submitted facts, upon which the expert based his opinion, are true. If any assumed fact was not established, you will determine its effect upon the opinion of the [2965] expert. However, as with all other witnesses, upon you alone rests the duty of deciding what weight, if any, should be given to the testimony of the expert. In determining its weight, you may take into consideration

the witness' skill, experience, knowledge, veracity, familiarity with the facts of this case, and all the other usual rules for testing credibility and determining the weight to be given to the testimony.

Now, the burden of proof. The State has the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr. was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the symptoms of death.

Now, reasonable doubt. Now then, what is reasonable doubt? The Legislature of the State of Ohio defined reasonable doubt as follows:

"Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly [2966] convinced of the truth of the charge.

"Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt.

"Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs."

Outweigh, now, to outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.

Now, it is the quality of the evidence that must be given primary consideration by you. The quality of the evidence may or may not be commensurate with the quantity

of the evidence, that is, the number of witnesses or exhibits presented in this case.

It is not only the quantity of the aggravating circumstances versus the quantity [2967] of the mitigating factors which is to be the basis of your decision. The quality or importance of the mitigating factors and the aggravating circumstances must also be considered.

Now, aggravating circumstance. What is an aggravating circumstance?

In this case the aggravating circumstance are the specifications upon which you returned guilty verdicts in four separate counts of the indictment.

In count one, aggravated murder, the murder of Horace Rickerson with prior calculation and design, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed Brian Warford.

"Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Horace Rickerson and also purposely killed [2968] Timothy Sheehan.

"Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender attempted to kill Coletta Dartt.

"Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part

of the course of conduct in which the offender attempted to kill John Hardaway."

In count five, aggravated murder, the murder of Timothy Sheehan while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery, they are as follows:

"One, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of [2969] conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"Four, that the defendant committed the offense of aggravated murder and that such aggravated murder was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed aggravated murder and that the victim of the aggravated murder was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

"Six, that the defendant committed aggravated murder and that the offense was committed while the

offender was committing or attempting to commit or fleeing immediately [2970] after committing or attempting to commit an aggravated robbery, and that the offender was the principal offender in the commission of the aggravated murder."

In count six, aggravated murder, the murder of Timothy Sheehan, with prior calculation and design, they are as follows:

"That the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill Coletta Dartt.

"Three, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely attempted to kill John Hardaway.

"That the defendant committed the offense [2971] of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Timothy Sheehan and also purposely killed Brian Warford.

"Five, that the defendant committed the offense of aggravated murder and that the victim of the aggravated murder presented above was killed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

In count eight, aggravated murder, the murder of Brian Warford with prior calculation and design, they a re as follows:

"One, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely killed Horace Rickerson.

"Two, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely killed Timothy Sheehan

"Three, that the defendant committed the offense of aggravated murder and that the [2972] offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely attempted to kill Coletta Dartt.

"Four, that the defendant committed the offense of aggravated murder and that the offense was part of a course of conduct in which the offender purposely killed Brian Warford and also purposely attempted to kill John Hardaway."

Mitigating factors, what then are mitigating factors? Mitigating factors are those which, while not excusing or justifying the offense, or offenses, may, in fairness and mercy, be considered by you, as extenuating or reducing the degree of the defendant's responsibility or punishment.

These mitigating factors include, but are not limited to, the history, character and background of the offender and the following factors:

One, at the time of committing the offense the defendant because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to [2973] conform his conduct to the requirements of the law. Two, any other factors, that are relevant to the issue of whether the defendant should be sentenced to death.

Now, consider the counts separately. Each count is a separate and distinct matter. You must consider each count and the evidence applicable to each count separately. You must state your finding as to each count uninfluenced by your verdict as to any other count.

Verdict, the procedure which you must follow in arriving at your verdict in this sentencing hearing is set forth in Section 2929.03 of the Revised Code of the State of Ohio. A summary of that section provides that you, the trial jury, must consider all of the relevant evidence raised at trial, the evidence and testimony received in this hearing and the arguments of counsel. From this you must determine whether, beyond a reasonable doubt, the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts are sufficient to outweigh the mitigating factors present in this case.

[2974] If all twelve members of the jury find by proof beyond a reasonable doubt that the aggravating circumstance in each separate count outweighs the mitigating factors, then you must return that finding to the Court.

I instruct you, as a matter of law, that if you make such a finding, then you must recommend to the Court that a sentence of death be imposed upon the defendant, Frank G. Spisak, Jr.

A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation. The final decision is placed by law upon the Court.

On the other hand, if after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which

the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to [2975] recommend to the Court.

The recommendation shall be one of the following:

One, that the defendant Frank G. Spisak, Jr., be sentenced to life imprisonment with parole eligibility after 34 years of imprisonment, or two, that the defendant, Frank G. Spisak, Jr., be sentenced to life imprisonment with parole eligibility after 24 years of imprisonment.

In this matter, your recommendation is binding upon the Court, and I, the Judge, must impose the specific life sentence you recommend.

Now, ladies and gentlemen, I may as well say something about the verdict form right now. There are two sets of verdict forms, one, "We the jury in this case, being duly impaneled and sworn, do find beyond a reasonable doubt that the aggravating circumstance which the defendant, Frank G. Spisak, Jr., was found guilty of committing was sufficient to outweigh the mitigating factors present in this case.

"We the jury recommend that the [2976] sentence of death be imposed and that the defendant Frank G. Spisak, Jr." – there is a spot for twelve signatures. All twelve of you will sign it if that is your verdict in this case.

There are four separate verdict forms for counts five, six and I believe it is eight. Now, there is also a set of verdict forms, same count numbers, read as follows:

"We the jury, being duly impaneled and sworn, do find that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., was found guilty of committing are not

sufficient to outweigh the mitigating factors present in this case.

"We the jury recommend that the defendant Frank G. Spisak be sentenced to life imprisonment with parole eligibility after serving" -- there is an asterisk for a spot on the verdict form for you to fill in either 20 or 30 years of imprisonment. And again, all twelve of you must sign whatever verdict it is you arrive at must be signed in ink.

Now, you must not be influenced by any consideration of sympathy or prejudice. It is [2977] your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of court to your findings, and to render your verdict accordingly.

In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

If, during the course of the trial, the Court said or did anything that you consider an indication of my view of the case, you are instructed to disregard it during your deliberations.

Now, your initial conduct upon entering the jury room is a matter of importance. It is not wise immediately to express a determination, to insist upon a certain verdict, because if your sense of pride is aroused, you may hesitate to change your position even if you decide you are wrong.

Consult with one another, consider each other's views and deliberate with the objective [2978] of reaching an agreement, if you can do so without disturbing your individual judgment. Now, each of you must decide this case

for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong. However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the other jurors.

Now, at this time I'm going to excuse the alternate jurors. Now, you will not participate in the deliberations of this case. However, I'm going to keep you here. Okay. Why don't you put them in Judge Aurelius' room. Now, you are excused with the thanks of the party and the Court.

Okay. Now, before you go, I know, I think you are all going to be here, but I want to tell you now, you must not disclose what your verdict would have been in this case, or discuss anything about the case until you have heard that this jury has been excused from their duty in this particular case. Okay. Thanks [2979] a lot, and we will see you.

Now, the jury will be sequestered in its deliberation upon a verdict. Now, you can have no discussion among yourselves, or with anyone else regarding any aspect of this case whatsoever. You are also under the same instructions heretofore given as to not viewing television, listening to the radio, or reading news reports on this matter.

Now, ladies and gentlemen of the jury, after your verdict is returned and you are discharged as jurors in this case, you may discuss it with anyone 'you wish. However, whether you do so is a matter of your own personal choice. In the event that you decide that you wish to discuss this case with someone, please do not speak for anyone or all of the remaining jurors in this case.

Now, the Court will place in your possession the verdict forms. The foreman or forelady will retain possession of these records and return them to the courtroom. The

foreman will see that your discussions are orderly and that each juror has the opportunity to discuss the case and to cast his vote; [2980] otherwise, the authority of the foreman is the same as any other juror. Until your verdict is announced in open court, you are not to disclose to anyone else the status of your deliberations or the nature of your verdict.

Why don't you approach the Bench.

(Thereupon the following proceedings were had at the sidebar on the record out of the hearing of the jury as follows:)

THE COURT: Do you have any objections to the Charge?

MR. SHAUGHNESSY: This is an important time on my part. Could you add one sentence, you are not to be concerned with the other counts, the functioning of the – the sentencing is the function of the Court.

(Thereupon, the following proceedings were had in open court:)

THE COURT: Ladies and gentlemen of the jury, the only counts that you are to be concerned with, as far as sentencing, are the counts that I have submitted to you, and in this instruction, and [2981] in this verdict form. All right. Good enough.

Ladies and gentlemen, you will have a copy of this written instruction. You will have, obviously, the verdict form, and you will have the evidence.

Now, I know it has been a real long day, and I'm sure you twelve people are tired. I'm certainly tired. What I would suggest you do is go back there, pick a foreman, decide what time you want to come back in here tomorrow morning, and let us know. We will discharge you for the evening.

It is seven o'clock, and I know you want to eat. You can go eat and resume deliberations in the morning. Okay.

(Thereupon, Court adjourned.)

APPENDIX F

TRIAL TRANSCRIPT OF DEFENSE CLOSING AT SENTENCING

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.
On behalf of the Defendant.

Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

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[2885]

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

MR. SHAUGHNESSY: Your Honor, Ms. Patricia Cleary, gentlemen at the trial table, ladies and gentlemen of the jury.

Let me, be fore I start, again turn to Patricia Cleary and Don Nugent and extend my compliments to them once again for the very aggressive, and the very professional way they have handled the second portion of this trial, or really, in a sense, the second trial.

We are in this portion of the trial going to disagree, but that doesn't mean that we hold them in any lesser light as to the professional way in which they conducted themselves. And let me turn once again to Judge James J. Sweeney and certainly extend my compliments to you, sir, for once again, and I mean this very sincerely, for once again presiding most judiciously.

You know, ladies and gentlemen, I suppose it is like any other job being a lawyer, but there is an awful lot to say for working [2886] conditions on any job. And there is an awful lot to say about the people you work for, and the people you work with, and as a lawyer, we talked about that the other day. I am proud to be a lawyer. I'm delighted to be a lawyer. And aside from the fact that I have trouble stopping when I talk, I enjoy being a lawyer very thoroughly. And part of that, and a good part of that is the working conditions, and

they have been excellent, and overshadowed only by the people we work with, and I just couldn't pick a better bunch of people, and that goes to the Judge and that goes to the prosecutors and certainly to the detectives who I think you found when - they say that our Cleveland Police Department is the best, I don't think anybody has any argument with that at all.

Certainly, I would extend my compliments to Billy McGinty and Jack Gardner, they are fine lawyers. They are fine professionals. And that makes the job of being a lawyer, it's kind of fun to come to work, it's what I'm trying to tell you.

Lastly, ladies and gentlemen, and once [2887] again, let me extend my compliments to you. We talked about the reasons why the other day, and we talked about that letter. I Suppose that you are to be complimented in this sense that you have certainly at this point really long endured. My pal Jack Gardner insists that if it were marketed, I would be the surest cure in the world for insomnia. And if he ever gets it on the market, he probably will make a million dollars.

Let's go on and talk about why we are here. The Court has told you, and again, you will be charged much the same way, the way you were the other day. This is the sentencing part of the trial, the trial within the trial. We kind of said this the other day when we talked to Dr. Bertschinger Saturday afternoon, as far as the defense in this case was concerned, ladies and gentlemen, what you heard since Saturday, that has been our ball game. You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors and before the prosecution rushes [2888] to point out, if any, let me add a comma, and say if any. That's probably the first thing that you have to find. Let's talk first about the aggravating factors.

I suppose so much could be said, but so little really needs to be said about the degree of the aggravating factors, clearly horrendous. No one who sat through this trial as a participant, the lawyer, a policeman, the defense lawyer, a Judge, a juror, a court reporter, the court attache, no one is ever going to forget the Frank Spisak trial, no matter how much time goes by.

Ladies and gentlemen, you are always going to be in addition to everything else that you are, if you are a truck driver, if you are a housewife, if you are a painter, whatever you are, in addition to that you will have taken on one other thing, you will have been a Spisak juror. And you are not going to forget, and none of us are going to forget, that cold day in February, February the 1st, 1982, because what you saw unfold here in the 60 or 70 witnesses, you didn't read just a news report, you didn't just see a [2889] minute-and-a-half on television, you saw a real three-dimensional you were there, is what it amounts to.

You were there, and on that cold day in February and, ladies and gentlemen of the jury, everyone of us who went through this trial, we know we can feel that cold day. And we can feel that, or see that cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is.

And, ladies and gentlemen, the reality of what happened there, the reality of what happened on February 1st, such that you can smell almost the blood. You can smell, if you will, the urine. You are in a bathroom, and it is death, and you can smell the death.

And, ladies and gentlemen, none of us have. participated, none of us, and we all participated. None of us who participated are going to forget that.

And, ladies and gentlemen, none of us who participated are going to forget that hot night in June. And you can feel, you can feel, [2890] the loneliness of that railroad platform at 117th and Madison Avenue. And you can feel the heat of the night. And we can all appreciate, and you can understand, and we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses and looked into the muzzle of a gun that kept spitting out bullets.

We were all with John Hardaway as he lay on that platform. And we all kind of cheered, didn't we, just a little bit, for the conductor who came along and used his good common sense to do the things that he did. And we all went through the surgery, and we were all kind of with John Hardaway when he came in here and he still got some physical problems, and we can kind of all feel those, and we are not going to forget.

Ladies and gentlemen,- we can go back to Cleveland State University, and we were there. We were really there on that day early in August when Coletta Dartt went to the ladies' room and encountered the guy sitting here in the brown, and we all know the terror, or we can feel that right in the pit of our stomach. [2891] We know how that feels when she ran down the hall first left and then right, and tried to dodge, or did dodge the bullet. But we were there, and we know she feels. And is it an aggravating circumstance, indeed it is, ladies and gentlemen.

And, ladies and gentlemen, on the 27th of August we were in another laboratory, and we were all there because we could smell it. And we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we

certainly can feel all of the things that they fell, because, ladies and gentlemen, we participated, and we were there.

And, ladies and gentlemen, on the 30th of August, nearly a year ago, you and I and everyone of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never what hit him, and we can feel that bullet hitting, and that is an aggravating circumstance. And we were [2892] there.

And we rode in that car night, that death car, and we were there so we can remember that hot night, and we could probably smell the stale beer in the car. And we can probably, maybe, smell some marijuana smoke, and we can feel the hatred, and if we listen closely, we probably could hear some jeers, some racial slurs. And we were with this guy here when he parked the car, the hunt car.

We were with him when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw hat fell off. And, ladies and gentlemen, would you ever want any more aggravating circumstances? I don't think that you would.

There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky. Coletta Dartt and John Hardaway. We call them lucky. Lucky, if you have a nightmare [2893] that will never go away. That's lucky, it may be, but it's an aggravating circumstance.

And, ladies and gentlemen, that's what you have got to weigh, the aggravating circumstances against the mitigating factors. And you heard the hate, and you heard the misguided philosophy, and if you live another ten years, or twenty years, or fifteen years, or fifty years, you are always

going to be another Spisak juror, among other things, because isn't what you heard kind of a microcasm, and some of us, not all of us, are old enough to remember. Isn't what you heard just a microcasm of a twelve year reign of terror that was unparalled in history, the Third Reich, and it was going to last for a thousand years.

And those clowns couldn't buy 12 or 13.

And if you listened closely, if you listened closely, ladies and gentlemen, to the hate that you heard in this courtroom, you were there in that laboratory, and on that railroad platform, and you were kind of there. They talked about crystal night. Now, ladies and [2894] gentlemen, if you listen closely, you can hear that breaking glass and somehow, somehow, you can twist this around, this sick distorted mind can twist around what they have, lab, and call crystal night when they broke out every window and ruined the business of every Jewish businessman in Germany. Crystal night, and it is funny? But to think if is awfully funny, you have to have a sick twisted mind.

You were here, and you were there, and if you listened closely, you can hear that. And I suppose, ladies and gentlemen, that's kind of a replay, an old newsreel of what he used to hear, sit back and listen real closely. And listen to this sick distorted mind, and you will hear once again kind of a muffled kind of dissent, but those hobnail boots on the cobblestone streets, but, ladies and, gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't admit, you won't hear the gas at Buchenwald, and you won't hear the gas in Auschwitz, because, ladies and gentlemen, it never made any noise in killing six million.

[2895] Aggravating circumstances, all the aggravating circumstances you ever want.

Turn and look at Frank Spisak. He has been here for six weeks now. And you probably haven't really looked at him. Turn and look at him. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much of life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford.

Now, the Judge has told you about mitigating factors. I suppose the word is somewhat self-explanatory, mitigating, a softening, it wouldn't be a good definition to say that it makes whatever happened less serious, but it is mitigating as to the blood, as to the one that caused all the horror that we have heard. The Court has told you that, or the [2896] Court will tell you that the defense on this portion could bring forward, and bring to you anything that the defense might consider to be mitigating, good deeds that a person might have done, an otherwise good life.

Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands none. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none.

And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.

The question then comes up, ladies and gentlemen, is there any mitigation. Is there any reason for you, ladies and

gentlemen, to go back to your jury room, to go back through the exhibits, to ponder the arguments, if they are worthy of pondering, and to do anything other than to recommend to this Judge that [2897] at the earliest possible time he be strapped in the chair and electrocuted.

Well, there is only one reason, ladies and gentlemen, pride. It is not within Frank Spisak, it lies not within Frank Spisak, but within ourselves. We talked about this on voir dire. We talked, alluded to it with the doctor. It has been mentioned in part. And, ladies and gentlemen, it is something that we've all grown up with, and something that we've always known. And it is something that is developed, and helps us, and will always be a part of us.

It is the reason that you get that little bit of a flutter when you hear them play the Star Spangled Banner, because, ladies and gentlemen, we are different. We are a humane society. If there is any reason, if there is any reason, ladies and gentlemen, for you to go back and not come back immediately and say, "Judge, we recommend to you that you electrocute Frank Spisak," it is going to be that which is within ourselves, that's that which makes us different.

You heard -- well, I think somewhere [2898] along the way it's been explained in the trial, it was explained, I think, on Saturday by Dr. Bertschinger,. that his initial concern was to determine in this case, and every other case that he was brought into, whether or not Frank Spisak was content. Whether he has sufficient mental ability to be brought to trial, and of course, the doctor said that he did. And we don't, certainly, aren't faulting that, but the point of that is that we are a humane people.

And the reason that we don't bring an incompetent person to trial, I'm not suggesting that Frank Spisak is incompetent at all, but the reason that we don't try an

incompetent man goes right back to the Judeo-Christian philosophy, the belief that our love, that our country has been founded on. And kind of can be simply said - that you can't commit a sin if you didn't have the ability to intend to do it.

If you couldn't form the intent, if you don't have the mental ability to commit the sin, no matter how horrendous, you have committed the sin, and we are different. [2899] We are different. We are a humane people and I think if you analyze it that we are proud to be different, and we are proud that we are different.

And the doctor went on the other day to tell us about criminal insanity. And it is kind of the same thing that we said, if you can't intend to commit a sin, to break the law, then as a humane people, different than most other countries, we don't terrorize one who can't intend to commit an offense, and we do that because we are a humane people.

And we don't find an insane man guilty, and we don't put an insane man in trial.

And the doctor said the other day that in describing this hearing, and you will recall that, and he said it much better than I'm going to say it, but that this hearing was in a sense a softening of the burden, the burden that the defendant will have to prove criminal insanity. And the reason we have this hearing is because we are a humane people. And the reason our general assembly has put this mitigating factor, the admitted ability, or the ability to substantially, and you will [2900] hear all that language from the Court, not insane enough to be criminally insane, but sick and demented so that the ability to intend is substantially reduced.

We are different, and that's why our Legislature has put that into the statute, because we are a humane people. So if we find a mitigating factor, ladies and gentlemen, it is nothing from within this sick tormented body, it is within

ours. It is in the way we grew up, the things that we are proud of. The philosophies that we have, the beliefs that we are willing to stand up and be counted for, and we are different.

The doctor in explaining, and he did an excellent job, of course, his role as the counter, counter-part of Dr. Resnick in this case, and then being in the clinic, certainly, he demonstrated his experience, and his credentials, and I suppose may be we can illustrate it this way, that if we were to put three jars upon the Judge's Bench, I don't suppose the Judge would like that, but let me do it for purposes of illustration, and if we put a big jar up there and a medium-sized jar [2901] up there and a small jar up there, and the Judge were to say to the defense, after the issue of incompetence, you must fill up this big jar and as to the issue of insanity, as the doctor said, the evidence has to fill up this medium-sized jar, and as to the mitigating factor, the evidence, at least, has to fill up this smaller jar.

Well, ladies and gentlemen, in the guilt portion of the trial, and I say this sincerely, we were wrong. We did not fill up the medium sized jar. We didn't have the evidence necessary to get that issue to you, ladies and gentlemen. We sincerely believe with the testimony that you heard, we have now filled out what we might call the smaller jar.

The issue is now there for your consideration. If you find it mitigation, then, of course, you must find it was in that smaller jar, too, outweigh the aggravating circumstances that have been so graphically and so three-dimensionally brought out before us.

And, ladies and gentlemen, that is a pretty tall order. Let me just refer to the doctor's testimony, and it might be helpful. [2902] And, of course, what you will do, as you did in the guilt portion, you will recall all of the testimony. And the testimony, of course, is the answer from the witness stand

to questions proposed by both the defense and the prosecution.

You recall Dr. Bertschinger saying, he said that Mr. Spisak in effect met the first prong of the statute, which is the test of legal insanity in Ohio, and that prong is that he has a mental disease, or defect. And then he said that he felt that he did not meet the other prong, or the remainder of the test. And the test is that he would not know the wrongfulness, or inability, total inability, to refrain from the act. And you can recall his testimony, and I'm sure either Ms. Patricia Cleary, or Don Nugent will recall their questions on cross-examination.

And the doctor's testimony there, and I'm not going to, obviously, read the whole transcript, we are all here, and we heard it. I thought there were a couple of things, though that were helpful. I thought there were a [2903] few things that were helpful.

Well, I did say that, "Based on reasonable medical and scientific certainty whether at the time of the commission of the offenses, Frank Spisak, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law?"

And the doctor in answering that question said, "Yes, I do."

He was then asked, "What is your opinion?"

And he answers by saying, "It is my opinion that Mr. Spisak was mentally ill and that mental illness itself, does impair his reasoning to the extent he has substantial inability to know wrongfulness, or substantial inability to refrain."

And that doctor was allowed to testify, and was allowed to tell you, ladies and gentlemen, who will

ultimately say to this Judge, we recommend that Frank Spisak be electrocuted, or we recommend that he be sentenced to 30 full years without parole [2904] on each count. You are allowed to hear that testimony. You are allowed to make that consideration, not because of anything nice he did, not because of anything good he did, and not because he has a nice mother, or a nice wife, or a nice sister, and not because maybe he used to feed the pigeons on Public Square, or some other good deed, but because from within ourselves as a people we have instructed our General Assembly to make that inability, that substantial inability a mitigating circumstance.

Now, ladies and gentlemen, during the trial, and during this hearing, and I suppose we ought to kind of talk about those things that are issues, and those things that really aren't issues, and, ladies and gentlemen, let me assure you if there ever was any doubt, and I am sure that there wasn't, that I'm not an issue, Billy McGinty isn't an issue, and Jack Gardner isn't an issue. And what we did, ladies and gentlemen, or what we didn't do, that isn't an issue; but the issue is, and rather obviously, that the mental inability of Frank Spisak, that condition as described [2905] by Dr. McPherson, Dr. Bertschinger and Dr. Markey, is that a mitigating factor, and does that factor outweigh the aggravating circumstances.

Now, during the final argument in the guilt portion, it was argued that Frank Spisak quote, made everyone go through this. Well, ladies and gentlemen, that wasn't true then and it wasn't true now.

MR. NUGENT: Objection.

THE COURT: Overruled.

MR. SHAUGHNESSY: None of us, the State, the defense, the Court, none of us had any choice in that matter,

we had to go through with it. And mention was made yesterday that Frank Spisak entered a plea of not guilty, and not guilty by reason of insanity, and indeed, he did. And you heard the rest of it. In this country, and this is another thing, ladies and gentlemen, that makes us different, and makes us great, and should make us proud, the Court told you at the beginning about the presumption of innocence.

Billy McGinty, Jack Gardner and I didn't sit down before this trial and invent the [2906] presumption of innocence, and nor did we inscribe the form not guilty, and not guilty by reason of insanity. We are lawyers, not the framers of the constitution.

Ladies and gentlemen, I'm not an issue, and to that extent I differ with my colleague Don Nugent. Are we to be faulted because we are lawyers? Are we to be faulted because we did what lawyers are supposed to do? 'And, yes, ladies and gentlemen, in the guilt portion, in the guilt portion, if anyone hasn't heard it up until now, let the word go out loud and clear, Tom Shaughnessy, Jack Gardner, and Billy McGinty were wrong, dead wrong, very, very wrong. We did not establish that what we set out to prove, that we told this Court at the very onset, that Frank Spisak was not guilty by reason of insanity. We did not, ladies and gentlemen, fill up the middle jar.

We tried; but are we to be faulted; is that the issue here?

Is my ability as a lawyer, or should that make one bit of difference to you when you go back to your jury room and decide whether to electrocute him, or lock him away for [2907] the rest of his life. I think not.

Ladies and gentlemen, if you disagree, and you are ultimately the ones who make that decision, if you disagree,

ladies and gentlemen, come back and express your disagreement, but I don't think that I'm an issue.

And on that Saturday, on that Saturday you heard the examination, the cross-examination of Dr. Bertschinger, and the doctor. It's true, isn't it, said by the prosecutor, that you met Tom Shaughnessy here for the first time. And, ladies and gentlemen I couldn't, but I really wanted to stand up and say, "You are damn right it's true." And would it make any difference, Dr. Bertschinger is a professional, whether he met me once or twice or 50 times? What difference does it make? I wasn't the issue. He wasn't examining me. If I did something wrong by not meeting the man until he walked down the hallway after Dr. McPherson testified on Saturday, well, so be it. We have a Bar Association, let me suggest that after you reach your verdict, whatever it is, we can have at least [2908] sixteen letters to the Bar Association saying, Tom Shaughnessy, obviously, is to be faulted, he didn't talk to his witness.

Ladies and gentlemen, let's turn that around. Should I have, perchance, had lunch with Dr. Bertschinger, do you suppose if I sat Saturday at some nuturous place like the Theatrical Grill, and said to the waiter, another double for the doctor, and here, doctor, let me slide you a couple more hundred dollar bills, and you know, doctor, we have got big egos as lawyers, and we want to win this case, and we want to convince everybody that he was insane at the time of the act, and, waiter, another double, and another couple hundred dollar bills, and doctor, do you think now that he is a little bit insane, do you think he is a little bit insane, and a couple more hundred, he is getting more insane now, isn't he, doctor, another double for the doctor, and another couple hundred, and he is really goofy now, isn't he, doctor?

We are lawyers, ladies and gentlemen. And we are damn proud of it. And I didn't meet with the doctor, and if

that should be [2909] considered by you, I will make another confession, ladies and gentlemen, until the doctor strolled down the hall on Saturday morning, I never even talked to him on the telephone. Bill MCGinty talked to him, Jack Gardner talked to him, some people in my office talked to him, I didn't talk to him. I read his report.

He is a professional. His opinion, and what he told you has nothing to do with what I did or didn't say to him.

And I did not meet with Dr. Markey. See, you can kind of have your -- the Judge said are you ready to argue, and I said yes, Judge, we are always ready to argue. And, see, you can always turn anything around, the innuendo is when I did something wrong, when I didn't talk to Dr. Bertschinger, and now that I talked to Dr. Markey, I guess I did something wrong there.

But we said to Dr. Markey, and you heard the testimony, Dr. Markey, I'm kind of a layman, I'm a lawyer from Buckeye Road, and I don't know too much about these kind of things, but I know that it didn't take [2910] any ten hours, or two, hours, it took me about two minutes, Dr. Markey, to tell you that I think we have got just a guy that's just crazier than hell.

Now, you are the professional, Dr. Markey, Dr. Bertschinger, and Dr. McPherson, and Dr. Resnick, and those other people. Doctors, will you take a look at this guy, will you do the things that you do professionally, will you take the abilities that you earned in the profession, in four years of undergraduate school, and four years of medical school, and one year of internship, and two, or three, or four years of residency in time, in the United States, in time in the college, and experience on the job, doctor, will you take for a poorly man from Buckeye Road, will you take all that ability that you have and will you go back and talk to this guy that I

made a snap decision about, that was crazy as hell, will you go and tell us professionally so that we can present it to the Court and to a jury.

And if I did something wrong, if that's [2911] to be considered, so be it. Ladies and gentlemen, we have got into kind of a little personality contest here. Yesterday the issue was will the real Mr. McPherson stand up, and we found out that we had two Mr. McPhersons. But now, ladies and gentlemen, if that's important, and presumably it was, or the one who brought it up wouldn't have brought it up, if that's important, and I didn't think it was, why did we bring it up?

We gathered here, and we have been together an awfully long time, and we know why we are here. We are here to weigh the mitigating factors against the aggravating circumstances.

And we had a guy on the witness stand who, simple mathematics will tell us, was about 84 years old, and who I think, if you looked at him, and you got kind of a sense of what he was all about, that he was a kind man, and he was an intelligent man, and he was a caring man, and he was a patriotic man, and indeed he was an old man, and you kind of got that sense, but then what [2912] was the point? Is it aggravating, is it aggravating circumstances, or is it a mitigating factor to say doctor, D.A. Mr. McGinty, came out and talked to you, and identified himself. You see, if I have suggested to you, ladies and gentlemen, that these folks over here were being unprofessional and have done something wrong, then if I created the issue, then you ought to stuff it down my throat; but did we have to ask him those questions?

And you know that the doctor was confused, but so what. Did the doctor say anything to their Mr. McGinty that he wouldn't say to our Mr. McGinty? And you do know that when the doctor called, and was upset that I said to the

doctor, come on, don't worry about it, it's not important, and you are a professional, doctor, you gave me your opinion.

And you know that the day the doctor walked into this courtroom, I said, well, doctor, this is a very good lawyer, Don Nugent, and this is a very good lawyer, Patricia Cleary, and they are prosecutors in this case. And we kind of had an opportunity to talk to [2913] you, or at least Billy has, and, doctor, why don't you take him across the hallway into an empty room, and you folks sit down and chat, and after you do, doctor, I would like to talk to you a little bit more about what you are going to say when you take the witness stand.

And these guys, and again, I use the term, certainly a professional, naturally with Patricia Cleary, these guys are professionals, but it is an issue, ladies and gentlemen. I didn't bring it up, and I didn't want to bring it up.

And you heard yesterday, and I don't know whether this is an aggravating factor or a mitigating circumstance, kind of a thing that you are going to agree with me that it is neither that, indeed, Billy McGinty fell for some kind of good nature, kidding, and got in a panic, and called up the doctor and said, doctor, are you really licensed to practice.

Well, so, you know we fell for a little kidding. Again, that doesn't, I suppose, say a lot for our astuteness, but we are not the issue. And I suppose if it is a mitigating [2914] factor, that would be all right with me, but if it is an aggravating circumstance, it probably wouldn't. I really don't think that it is either. I don't think that you do. And you recall in earlier argument -- and by the way, by the way, so nobody is wondering about this, we are advocates. And, you know, the word advocate kind of, when you come down to it, kind of means to sail.

And you know that I have a point of view, and, my goodness, I don't think it comes as any great shock to anybody that indeed in a real sense, I'm an advocate, or trying to sell you my point of view. And I don't think you are going to be shocked to know that Don Nugent is an advocate, and Patricia Cleary is an advocate. And they are excellent advocates. And they are going to try to tell you their point of view. Ladies and gentlemen, you did hear in the argument, and when I argue with Don Nugent, I don't mean it to be personal. And I hope that, and I'm sure I know that, I can hope, I'm sure that when we walk out of this courtroom that I will have the same respect, and we will have the same friendship [2915] with both of these fine lawyers; but I have got to argue because the Judge said was I ready for argument, so let me argue just a little bit.

Now, Don Nugent argued in the guilt portion, and that was fair enough, that was what he was supposed to do. He said Frank Spisak kind of sat here, I don't know if he said smirking, but that's what he did, and he waited until he heard all the witnesses, and then he kind of made up his defense.

There are a Couple of points there, ladies and gentlemen. The first of which is that, again, we are just the lawyers, and the order of trial is prescribed by the law, and the order of trial, obviously, is that the State goes first, and they did. And they did a most admirable job, culminated by one of the most brilliant and succinct final arguments that I have heard, and that was delivered by Ms. Patricia Cleary a week ago.

In any event, Frank Spisak had no alternative but to sit there on the first day of trial. He could not have popped up and said, now, I want to tell you what my defense is [2916] before anybody else says anything, that is so I won't be accused of sitting here and making it up after I heard the other evidence.

Well, now, you know that he couldn't do that. But if any question remains about that kind of sit down here and look at the reports. And you know that back months ago he was talking to Dr. Resnick, and he was saying the same things, and he talked to Dr. Althof and Mr. Williger, and a number of people. And he said about the same thing.

Ladies and gentle men, if it is important, and it may not be, but if it is important, he didn't sit here and make up his defense. And, ladies and gentlemen, on Saturday night when we ended, the question was asked of the doctor, and again, the lawyers aren't the issue, but Dr. -- and I don't remember how it was phrased, and if I'm inaccurate, Don Nugent will straighten it out, because he keeps better notes than I do. Well, kind of like doctor, these guys went and they got your opinion, and then they went and got somebody else's opinion, and maybe they didn't like that, and they went and got another opinion, and another [2917] opinion, and in all they got five opinions.

Well, I don't know if you think that's important. Well, make it important, and go back and talk about it. But do you suppose that the lawyers, the lawyers in this case, where a man very well may be electrocuted, ought to be bolted if they get a second opinion, or a third opinion, or a fourth opinion, or even a fifth opinion? A lot of people have relatively minor medical problems, and they go check with another doctor.

And you heard what the doctor said about the objective. And you heard what the doctor had to say about the state of the argument. And that respected doctors did disagree.

Of course, in this case they all agree. They all substantially agree, all five. All five said to us that he didn't fill up the middle jar, but all five, all five said that he filled

up the smaller jar. The jurors may now consider whether that mitigation outweighs the aggravating circumstances. And you heard the doctor say that it wasn't an exact science. Here's not two and two is four. And you heard the doctor, the [2918] doctor say that a couple hundred years ago, and we don't think of 200 years ago as being that unenlightened, we had a guy around then by the name of Benjamin Franklin, he had already invented electricity. And we had a guy by the name of Thomas Jefferson, and some other fellows that did a pretty nice job on a document called the Constitution of the United States of America.

And we think of those folks as being pretty enlightened, and they were: but at the same time they were, their contemporaries in the medical profession were sitting people down in chairs, putting hoods on their heads, and spinning them around, and that was thought to be a cure for the dementation, the twisted minds of the day.

Somewhere along the way, we heard that earlier in our history, the learned medical men, the respected medical men of the day, thought that burning witches was the way that problems ought to be handled f if indeed they were witches. And they were no less respected. The doctors in this case, and that seems to defy the laws of probability, the [2919] gambler's chance, they all five substantially agree because they all did agree, or they all agree that the argument of the psychiatrist is based on philosophy and theory. And they all did agree. And they all did, or they all do agree that indeed we filled the smaller jar, or the smaller of the three. And by calling it the smaller, don't let me suggest to you that it still isn't a substantial burden, but it is now there before you, and you may consider it.

I think the doctors laid to rest the idea, or the thought that, well, you take 24 hours out of some guy's life, and he is a nut. And that maybe 23-l/2 of those hours he is going to be

sane and rational, and do sane and rational things, and then for maybe just a few minutes do something bizarre. And I thought the one doctor said it very well, or at least answered the question very well, you know, even Jack the Ripper didn't spend 24 hours a day strangling ladies in London with silk stockings.

The result is that you don't explain away a sick, demented mind by saying that occasionally, or much of the time that a person [2920] and I think the doctor explained that, that the person did normal things. And even there, you will recall the getting along well argument, why he was getting along well at work, wasn't he, doctor. Well, if getting along well is wearing a White Power T-shirt and getting into beefs with the union steward, I suppose then that we will say that was getting along well.

And if getting along well in your neighborhood is keeping your across-the-hall neighbor in somewhat of a constant tizzy, not knowing if you are a fag or a transvestite, or if you are going to start shooting up the place, because you heard Sharon tell us that he kind of always shoots up the place, or shot out the window, or something, then if that's getting along well, I suppose that we can lay that to rest then. Or if being whistled at by your neighbor, young Jeff, if I walked out of my house and the next door neighbor whistled, I probably would be inclined to punch him, or say something smart. but I wouldn't go home and say to my wife, Margaret, dear, I am certainly getting along with my neighbors very [2921] well, Joe Blow next door just whistled at me and smirked. I think that I wouldn't do that.

Now, ladies and gentlemen, talk a little bit about that later, but one of these two fine prosecutors, and I don't know which one, Patricia Cleary, or Don Nugent are going to argue. What I say to you here will be the last opportunity ever in this world, you all say thank God, that I will get to

address you. And you are going to, whichever one it is going to be -- if it's Don Nugent, I suspect a barn-burner of an argument. If it's Patricia Cleary, I expect a model of succinct logic. Whichever it is, it is going to be better than what I have done, and I have got no problem with that. In addition to being humble, I'm somewhat modest. The point being, never again will I get a chance. In all of the arguments with my wife, I never had the last word. I suppose I should be used to it.

But you are going to notice my discomfort, and all I can do, all Billy McGinty can do and all Jack Gardner from this point on in, is sit [2922] there and squirm and say to ourselves, my God, would I like to be able to jump up and give them a snappy answer, because I could straighten them out on that, but the rule of the game, and Spisak's lawyers are content and happy with those rules, are that I address you, and then he does.

And I would like to be able to answer his arguments, but I won't be able to. I can only just sit there and squirm.

Whoever argues, ladies and gentlemen, I suspect that somewhere along the way, and again we are advocates, that you are going to be exhorted to, don't be afraid to come back and vote death.

Well, ladies and gentlemen, if someone suggests to you that you don't have to be afraid, if someone says to you, don't be afraid, well, ladies and gentlemen, look that person in the eye and say, you don't have to tell me that. You don't have to tell me not to be afraid because it was about now five weeks ago, it was about five weeks ago when I stood, and I looked him right in the eye, and I said when I stood there about five weeks [2923] ago and raised my right hand and took the juror's oath, I knew what I was doing. I knew what the responsibility is. And I am here to listen to the facts, not

to be having it suggested to me that I don't have to be afraid because Mr. Prosecutor, or Ms. Prosecutor, when I stood and raised my right hand, I was telling you and the whole world that I could take the heat. That I can take the heat, and for the balance of this trial, I will stay in the kitchen.

So Ms. Prosecutor, or Mr. Prosecutor, you don't have to tell me that I don't have to be afraid.

Ladies and gentle men, we talked about this before. No matter what else you are, you have now added another dimension to your lies. Whatever you are, whatever you become, part of you is always going to be, you are a Spisak juror. And you know, ladies and gentlemen, your position is not now, nor will it be in the future, inviable in this respect, and that is as a Spisak juror you will be damned if you do and you will be damned if you don't.

[2924] Ladies and gentlemen, you will be second-guessed, and you will be criticized

MR. NUGENT: Objection.

THE COURT: Sustained.

You are to disregard those remarks.

MR. SHAUGHNESSY: All right. You will always be a Spisak juror. Being afraid, you agreed with us that you could take the heat. You agreed with us that you would stay in the kitchen and do the job. And the job simply is to put personality aside, to weigh the mitigation, the smaller of the three jars, with the aggravating circumstances, which no question about it are substantial.

Now, why don't I suggest this at this time, and again, the job is a big job, but I suppose it can be well done. Again, the result of a simple equation, that simple task not so simple, we all know, but after weighing those mitigation factors

against the aggravating circumstances. And once a gain the lawyers are not the issue.

If I have done anything. and it has been a long time, if I have done something wrong, if I have offended anyone by anything that [2925] I said, or did, or didn't do, I would ask if you would while you are deliberating, and until you reach a verdict, whatever it may be, to lay that aside. If you were offended, at the appropriate time it would be certainly a proper question after you reach the verdict if you have got a bone to pick with me, I'm out on Buckeye Road at 11510, and I'm out there nearly every day, and a lot of nights. Call me up and say, look, I had to endure the things that offended me for the last six weeks, and I feel strongly enough for I want to call you and I want to tell you about it; but the point is if I have done something, don't let it be part of your decision. Don't let it weigh either as an aggravating factor, or as a mitigating circumstance.

Now, certainly, and it probably doesn't have to be said, but that's never stopped me before, I will say it anyway, what you do, and what you are going to do, is important tomorrow, or the next day, or the day after, whenever the cameraman is going to pack away his camera, and he will leave, the spectators [2926] will fold up these extra chairs, and they will leave, and the lawyers on both sides will go about doing some other things, and if you came back here in a month, there would be something else going on important to the people who are here then, for sure, but the Spisak trial will have ended; but, ladies and gentlemen, what we do here, and I'm not suggesting in any way, and I'm not trying to give anybody a guilt trip, but what we do here is vitally important as a people, as a humane people, and that's why it is important to weigh it partially and fairly and be loyal to that oath that you took.

You are not going to be guided by sympathy, and you are not going to be provoked by fear; but, ladies and gentlemen, it is important because what we do as a people long after the cameras are packed away and the extra cares set aside, that decision will remain, And we said the other day, and let me remind you again, that this trial is going to leave a mark, certainly, on everyone. And it may take a day, it may take several days for you to realize that; but the sordidness, [2927] the awfulness of what we have experienced has to leave us.

Ladies and gentlemen, it has to leave us a little bit older, and it has to leave us a little bit more jaded, and a little bit more hurt. My God, you've looked in the back of the court room, and there are some people sitting right there, right back there now, and you know who they were. And you know that their lives have been tremendously affected, and you know that they are torn up. And it is important. And it is awfully important what you do. And we are all going to be a little bit wiser, we are all going to be a little bit more jaded. And maybe, as I said the other day, the sun won't really look as bright, and the air won't smell as sweet, and the air won't sing as nicely, and that's a shame, isn't it? It's a real shame that we can't all be back in the doll house existence where we once were, where Bambi ran in the forest and every thing was good, and there was no evil.

We have seen too much of it here.

We are human people. And if we are older, [2928] and a little bit more tired, and if we got a few tears in our eyes, and we should have a lot, ve can still be proud. We can be proud because we are a humane people. And we can be proud whatever we do. And please, I'm not suggesting a guilt trip, whatever you do, we can be proud because we lived up to the oath that we took.

And I suggested the other day, and I suggested it, yes, before, and I suggest it again because I think it kind of says it all. When we leave here, what we will have left is our memories. We are proud to be lawyers. You are proud to be jurors. These guys can be proud to be prosecutors. These policemen can be proud to be policemen, because they are darn good policemen. And this Court can be proud to be a Judge, because he is a darn good Judge.

And again, whatever you do, we are going to be proud of you. And let that memory be as I said the other day.

And I think it is true that God gave us this thing called memory, this computer that stores up those things that make up our own [2929] worth. God gave us memories so that we could have those roses in December. I have never been in a longer trial. I have never been in a trial that has been any more important, and to everybody, from the back of the room to the front of the room. I have never had the opportunity to work with a nicer bunch of people, and folks, I'm proud of that. And thank you very much.

THE COURT: Thank you, Mr. Shaughnessy.

Ladies and gentlemen, I know I'm working you a little late. I appreciate your patience. Why don't you go back there, stretch for a couple of minutes, throw some water on your faces, we are going to finish this case.

Remember the admonitions.

(Thereupon, a recess was had.)

THE COURT: Mr . Nugent, you may begin your argument.

MR. NUGENT: Thank you, Judge.

APPENDIX G

EXCERPTS FROM TRIAL TRANSCRIPT OF WITNESS TESTIMONY OF OFFICER HARVEY BEAVERS

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.
On behalf of the Defendant.

Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

Volume 3 of 10

[1108]

THURSDAY MORNING SESSION, JUNE 30, 1983

THE COURT: You may be seated. Ladies and gentlemen, we are going to work until noon today. Okay. Something has come up we have to attend to. Call your next witness. Step forward and raise your right hand and the bailiff will swear you in.

THEREUPON, the State of Ohio, to further maintain the issues on its part to be maintained, called as a witness HARVEY BEAVERS, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. NUGENT:

***

Q: Would you explain for us what those are and what he said in response to those rights?

A: We explained to him the Miranda rights. We told him he had a right to remain silent. Anything he said could and would be used against him in a court of law. We told him he had a right to an attorney either appointed or retained. If he could not afford an attorney, one would be appointed for him.

Then I asked him if he understood these rights and he stated that he did. Then I asked him if he wanted to talk to us, and he stated that he did.

***

[1113]

Q: Would you tell us in best detail that you have, the conversation you conducted with the defendant Spisak, tell us what you said, what you or Detective Taliaferro said during this conversation.

A: Well, first of all we went into several areas of Mr. Spisak's life. We talked about his childhood. We talked about his married life. We talked about [1114] his job classifications. We then went into the incidents themselves one by one.

We started in with Reverend Rickerson and I asked Mr. Spisak, or I asked Frankie why did he kill Reverend Rickerson, and he said that Mr. Rickerson was a man of the cloth, a Minister, and Mr. Rickerson had made a homosexual pass at him and he shot him.

I asked him what led up to this. He stated that he was in the men's room at Cleveland State University in early February, and Mr. Sheehan had walked into the men's room earlier and Mr. Sheehan had made a pass at him, and he decided that he would let that pass.

Mr. Sheehan then left the men's room and Mr. Ricker son came in right behind him, and he stated Mr. Rickerson took a seat in one of the stalls and then made a homosexual pass at him.

He stated that he was going to leave that alone, too, but he decided that he was a Minister, a man of the cloth, and he indicated to him that he wanted a homosexual experience and he decided that he would give him the ultimate blow job and he blew him away.

[1115]

Q: Did the defendant Frankie indicate to you how he knew that the Reverend Rickerson was a Minister or a man of the cloth?

A: Yes, sir. Frankie was a student at one time at Cleveland State University and on various occasions he would return to the campus of Cleveland State University. So he knew Horace Rickerson. He knew Mr. Sheehan also, or knew of him.

Q: Now, after did he tell you anything further about where he got the gun, anything about the Reverend Rickerson's killing?

A: The Reverend Rickerson's killing and the guns I did not go into because I was not familiar with the weapons involved in the killing, so I did not go in to the weapon end of it.

I did ask him, as I say, we went through it one by one. And I then asked him about Mr. Sheehan's homicide.

Q: Okay. And what did he tell you about that?

A: He stated later on that he, I guess, in early August, he was at, again, at Cleveland State University, and he entered the men l s room. And Mr. Sheehan came in and he felt that Mr. Sheehan probably remembered him from the time Mr. Rickerson was [1116] killed since he was in the room prior to Mr. Rickerson being killed.

He stated that he thought he was a witness to that and that he killed him, he shot him. He further indicated that Mr. Sheehan was the keeper, or the custodian at Cleveland State University and tha it was his job to keep the university clean, to keep the men's room clean, and keep any filth out of the men's room. He stated that Mr. Sheehan did not do this, and that he was a part of it. He knew what was going on and as a result of it, he did not do his job.

And he did what he had to do, he killed him.

Q: Did he indicate to you whether he took any property or any items from Mr. Sheehan at all?

A: He did not indicate that to me, sir, to my knowledge, no.

Q: Did he say anything else about the reasons, other than the fact that he thought that Sheehan was a witness to the Rickerson homicide, or a witness to him being there, and that Mr. Sheehan was the keeper of the grounds at the Cleveland State University?

A: Well, and further, after he indicated the reasons for killing Mr. Sheehan, he went back to [1117] Mr. Rickerson and what-have-you, he made the statement, he stated that the Bible stated that the wages of sin is death. And that Mr. Rickerson had been paid just as Mr. Sheehan had been paid.

Q: Did he quote a particular section of the Bible for that, or a particular writer of the Bible?

A: To my knowledge, no. He just made the statement.

Q: After he made these comments about the Reverend and Mr. Sheehan, what next did he say?

A: I then asked him about Brian Warford. And he stated that he was just driving down Euclid Avenue. And he observed Mr. Warford sitting in the bus stop. And he turned his car around, parked, got out of the car, and walked up to Mr. Warford, and shot him. I then asked him, I said, did Mr. Warford say anything to you? He said, no, he did not.

I said, did you say anything to him, to Mr. Warford. He said, no, I did not. He said he never knew what hit, him. I then asked him, did you take anything from the body of Mr. Warford? He said he didn't have anything to take.

[1118]

***

Q: Now, did you ask him what he was doing that night to be driving up and down Euclid Avenue?

A: Yes, sir. We talked to him about his activities during the night and what-have-you. He stated that of times he would just drive around and sometimes he would just walk into the neighborhood, or drive in to the neighborhood, hoping that a black would say something to him, or do something to him, so that he would shoot him.

Q: All right. So he did indicate to you there a number of times he was out looking for a black per son to shoot, but he didn't shoot?

A: Yes, sir.

Q: And then on the evening that Brian, or the early morning that Brian was gunned down, did he tell you what his purpose was in going out driving [1119] around?

A: No, sir, other than for him to say that he oftimes drives around looking for something to happen.

***

[1120]

[A:] that there came a time when he was not [1121] working regularly and then he was eventually laid off and at this time he felt that he could fully focus on that which he was thinking and that which he wanted to do.

Q: All right. Did he tell you what he was thinking and what he wanted to do?

A: Yes, sir. He admitted to being a member of the Nazi Party. He admitted to hating blacks. And he admitted to ha ting Jews. In his hatred for blacks, it was basically limited to men, to black men.

***

[1127]

Q: Did he indicate whether he had any regrets when he was caught?

A: He had regrets, yes. His regret was he was caught and he did not -- he would not have a chance to finish his work, but he stated that someone would pick up the battle for him and finish that work which he had started.

***

[1131]

Q: Now, during the second conversation did he indicate to you other than his joy riding around looking for individuals to kill and he ended up with Brian one night at Cleveland State that he intended to carry his killing on at another campus?

A: Yes, sir.

To my knowledge he indicated three areas where he was going to carry out his further activity.

He stated he was going to go to the rotunda of Cleveland State and just open up on whomever was there. He stated he was going to further expand his feelings and his actions to the campus of Western Reserve University.

He also stated the one thing he really wanted to do was to go to Vel's Party Center which is between 105th and Euclid and Carnegie and he was going to walk in there with a machine gun and just open up on every black who was in there and then he was going to start on all the Jewish lawyers, one by one, he wanted to eliminate all Jewish lawyers.

Q: Now, sir, did he tell you about a time he went to Cleveland state University campus armed with a weapon in a book and there was a meeting of the [1132] top personnel concerning the killings that were going on on the campus?

A: Yes, sir. He stated one night he was on the campus of Cleveland State University and this was after the killings there. He stated there was a lot of top personnel at that meeting there and he stated he was stopped by a Cleveland State uniform guard for being in a restricted area, and then the guard checked him out and let him go.

He stated he was on the elevator, he had gotten on the elevator and there was a black man standing on the elevator next to him.

He stated he thought that, you know, that would be a fantastic time to kill an individual with all of these top personnel, top police personnel people here, and then having a killing happen right in their midst.

He stated he took the gun out of his pocket and he was just getting ready to shoot this man when the elevator door opened and a white man stepped on and he stated he became highly upset so he put the gun back in his pocket and he was very, very angry at this white guy, the white individual for stopping him, stopping him from performing this act and it totally upset him so he got off the elevator [1133] and he went home, but this blew his night.

Q: So from what he told you he wanted to kill the black man, but because the white man got on the elevator, he didn't do it?

A: No, he didn't do it.

MR. NUGENT: Thank you, Detective.

APPENDIX H

EXCERPTS FROM TRIAL TRANSCRIPT OF DEFENDANT FRANK G. SPISAK

THE STATE OF OHIO,
COUNTY OF CUYAHOGA.
SWEENEY, J.

IN THE COURT OF COMMON PLEAS

(CRIMINAL BRANCH)

Case No. CR-181411

THE STATE OF OHIO,

Plaintiff,

vs.

FRANK G. SPISAK, JR.,

Defendant.

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES

John T. Corrigan, Esq., Prosecuting Attorney, By:
Donald Nugent, Esq. and
Patricia Cleary, Esq., Assistant Prosecuting Attorneys
On behalf of the Plaintiff;

Thomas M. Shaughnessy, Esq.,
John Gardner, Esq., and
William McGinty, Esq.
On behalf of the Defendant.

Cynthia D. Lee
Rose V. Black
Official Court Reporters
Cuyahoga County, Ohio

Volume 4 of 10

[1297]

THE COURT: You may be seated. Ladies and gentlemen, the State in this case has rested. Mr. Shaughnessy, do you wish to present testimony?

MR. SHAUGHNESSY: Indeed we do, sir. The defense, your Honor, will call Frank Spisak, who will testify in his own behalf.

THE COURT: Okay. Mr. Spisak, step forward, sir, raise your right hand, the bailiff will swear you in.

THEREUPON, the Defendant, FRANK SPISAK, to maintain the issues on his part to be maintained, offered himself as a witness in his own behalf, who, being first duly sworn, was examined and testified as follows:

[1298]

DIRECT EXAMINATION BY MR. SHAUGHNESSY:

***

[1309]

Q: Now, if you liked your studies, if you liked the courses, tell the folks here, if you will, after having taken college prep, why did you cut your college career, what some of us may think, why did you cut it short after that period of time at Cleveland State?

A: Two reasons: A: It was dollars and cents. I couldn't afford to continue my schooling on my own; and, B: I was

devoting a lot of my time and energy to political activity at that time and I decided to become active in the American Nazi Party local unit here in Cleveland, Ohio.

Q: Is it fair to say that your political philosophies, your desire to become active in the Nazi Party, that then took over your earlier desire to go to school?

A: Right. I still had a desire to go to school but you can't be everywhere all at the same time.

***

[1338]

Q: Let's digress for a moment. You told us that in 1971 then you were working, working at Kay's Book Store, and you had an interest in pursuing activities with the American Nazi Party, and you then discontinued your schooling.

What got you interested in the American Nazi Party?

A: Well, I read a lot of books about Hitler when I was in school.

Q: High school?

A Junior high.

Q: All right.

A: Senior high, college.

Q: Why did you read a lot of books about Hitler?

A: I was interested in him.

Q: All right.

A: I wanted to know the truth.

Q: And you say you wanted to know the truth about what, Frank?

A: About the man and about that period of history in which he lived.

Q: All right. [1339] Based on your reading, did you learn what you perceived to be the truth?

A: Yes, I did.

Q: All right. Incidentally, what is the truth as you perceive it?

MR. NUGENT: Objection.

THE COURT: Sustained.

Q: When did you first join the American Nazi Party?

A: In 1970.

Q: In 1970, which city, or where was it that you joined the American Nazi Party?

A: They had headquarters in Arlington, Virginia ever since 1959 when they were first founded by Commander George Lincoln Rockwell.

Q: All right.

A: And in that year the people of the City of Cleveland decided to open a local one on Clark Avenue, I mean Lorain Avenue.

Q: Lorain Avenue, about what cross street, for those of us who may not remember?

A: Right around St. Ignatius, 99th and Lorain.

Q: Near the West Boulevard area?

A: Right. [1340]

Q: All right. That was in 1959?

A: That's right.

Q: All right. Did you in fact then at that time become a member of the American Nazi Party?

A: Yes, I would say I was a member.

Q: All right. What did you have to do to become a member of the American Nazi Party?

A: Just join it.

Q: Well how did you do that? Did you go –

A: They had a little paper.

Q: Did you go someplace? Did you do something?

A: Fill out a piece of paper and you send in a couple of bucks every month.

Q: Did you go –

A: You get a neat little card you put in your wallet.

Q: A neat little card. What does the neat little card say?

A: I forget what it says, but it's got a Swastika on it. It's red, white, and black.

Q: Red, white and black. Are those colors relevant to anything?

A: Sure.

Q: What are those colors relevant to? [1341]

A: The flag that Adolf Hitler designed.

Q: The flag that Adolf Hitler designed. All right.

Your card was red, white and black, it had a Swastika on it, and was neat and you put it in your wallet?

A: Right.

Q: To become a member of the Nazi Party, did you have to go someplace to this headquarters, perhaps?

A: It helped if you hung around there, you know, and contributed to the work.

Q: All right. When you say to the work, did you hang around there and do some work?

A: Sure.

Q: What kind of work did you do, Frank?

A: Well, when they first opened the place, it was called a book store.

Q: All right.

A: Which was kind of misleading, because they didn't have many books in there.

Q: All right.

A: Because they didn't have much money, but I did the same thing there I did at Kay's, when people come [1342]in, they want to find some thing, I helped them find it.

Q: And that was books, presumably, unlike Kay's Books, that had something to do with the American Nazi Party?

A: Right.

Q: All right. Did they have regular meetings there?

A: No, they didn't have regular meetings, but they had this tape recorded telephone message. You call a phone number and there is a tape recording that gives little messages for about one or two minutes. You listen to it like a weather report, it tells you what's going on, that kind of thing.

Q: Would that be the American Nazi activities?

A: No, just what's going on in the world.

Q: I see.

A: Yes.

Q: Kind of a minute or two then summation of news then. All right. To become a member of the American Nazi Party, did you have to take an oath?

A: At one point in time, I did, yes.

Q: What oath did you take?

A: I took an oath of loyalty to the Commander of [1343] the movement.

Q: And who is the Commander of the movement?

A: Matt Koehl.

Q: And how do you spell that last name?

A: K-o-e-h-l.

Q: All right. Who is Matt Koehl? You told us he is the Commander, but where did he live, what does he do?

A: Sure. When Commander Rockwell was martyred in 1968 in Arlington, there was nobody to take over the party except for Matt Koehl, who was the designated successor. So he assumed the position of leadership.

Q: All right. And there came a time then in 1970 when you took an oath to do what?

A: Well, you take an oath of loyalty to the Commander, but the spiritual leader of the movement is and always will be Adolf Hitler.

Q: All right.

A: You've got to realize that.

Q What does the oath entail? What does one say when one takes the oath?

A: I don't remember the exact words, but basically what you are doing when you take the oath is you are [1344] declaring war on the society that exists today.

Q: And you are talking about the society where, in Cleveland, in this country?

A: All over the world.

Q: All over the world. Were you in favor -- did you voluntarily take that oath?

A: Yes, I did.

Q: Why did you do that?

A: Because the one world system today is totally opposed to everything that I believe and stand for.

Q: All right. Now, Frank, let's digress from this. Let me ask you, you told us about your apartment, you had two bedrooms, a living room, a kitchen, which after Laverne left had no ice box or stove. What kind of things did you have in your apartment?

A: Furniture, stereo.

Q: All right. A lot of tapes for the stereo?

A: Sure.

Q: What kind of tapes did you have in the apartment?

A: All kinds, music, speeches.[1345]

Q: All right. Speeches by whom, Frank?

A: Everything, Hitler, George Lincoln Rockwell.

***

One of them is a tape of a BBC broadcast. I think it was in 1940, or '41. And there is a BBC commentator that

was given a translator right along, you can hear the Fuehrer in the background.

Q: You say the Fuehrer?

A: Yes.

Q: Of whom are you speaking?

A: Adolf Hitler.

Q: Adolf Hitler is the Fuehrer. [1346] What does Fuehrer mean in English?

A: It means leader.

Q: It means leader. All right. And after taking the oath, did you consider Adolf Hitler to be your Fuehrer, or your leader?

A: Sure.

Q: All right. Do you consider today that Adolf Hitler is your leader?

A: Definitely.

Q: Spiritual?

A: Definitely.

Q: Now, in taking the loyalty oath that you told us about, could you, at the same time, could you at the same time pledge the allegiance to the flag that you told us about at an earlier time, that's also a loyalty?

A: That's right.

Q: Are the two consistent, or inconsistent?

A: No, they are not inconsistent, because the American Constitution represents, as it was set up, no longer exists. The Constitution has been superseded by the Charter of the

United Nations, and that's why the pledge of allegiance was removed from the schools.

[1347]

Q: All right. You feel perfectly at ease then today pledging allegiance to the flag of the United States, but at the same time telling us that your spiritual leader, at least, spiritual, is Adolf Hitler?

A: Adolf Hitler stood for an idea, almost the exact same idea that our founding fathers had, but the United States is no longer run by the principles of the founding fathers. It is run according to the dictates of the one world leaders.

Q: And who are the one world leaders, Frank?

A: The Jews.

Q: All right. And does that upset you?

A: Yes.

Q: Does it upset you to the point where you would kill?

A: Yes.

Q: All right. Let's talk about a gentleman by the name of Reverend Rickerson. Do you know who I'm talking about?

A: Yes.

Q: All right. Do you know who killed Reverend Rickerson?

A: Yes.

Q: Who killed Reverend Rickerson?

A: I did.

Q: Why did you kill Reverend Rickerson?

A: I had good reason.

Q: All right. What was the good reason, Frank?

A: It was something he did.

***

[1349]

Q: Well, what are the names of the splinter groups then in which, Frank, in which you were attached?

A: The National Socialist Party of America, the American Socialist White People's Party and the Social Nationalist Aryan People's Party.

Q: Now, the word Aryan means what?

A: White.

Q: To get into the Party, the Aryan Party, the White People's Party, did you have to take an oath?

A: No, not a formal oath.

Q: Not a formal oath. How did you become, or how does one become a member of the three splinter groups that you told us you belonged to?

A: All one has to do is align oneself, declare oneself to be in agreement with what those groups stand for.

Q: Are you in agreement with what those groups stand for?

A: Yes. [1350]

Q: Is what those groups stand for, is that in disagreement with what you believe most people in America stand for?

A: No. I wouldn't say it is in disagreement with what most people stand for. I would say it is in disagreement with what the leaders are telling the people, what the people are being programmed into believing.

Q: You say people are programmed, who are they being programmed by?

A: The masses are being programmed by the news media, people who control all the thoughts of public opinion.

Q: And who are those people?

A: Jews.

Q: Exclusively Jews?

A: Almost exclusively, yes.

Q: Almost exclusively?

A: Yes.

Q: Does that upset you?

A: Yeah, sure.

Q: How are people being programmed?

A: When they watch TV, listen to the radio, read the newspaper, go to the movies, buy a book. [1351] That's all propaganda.

Q: And propaganda urging what or programming people to do what or be what?

A: Getting them to believe what the one world system wants them to accept as the facts and the truth.

Q: And what is that?

A: Any different things. One, that the races are equal, there is no difference between black and white.

Q: Is that true?

A: Of course not. There's plenty of differences.

Q: The difference is obvious, isn't it, white and black?

A: That's one.

Q: You find some other differences?

A: Sure.

Q: What other differences do you find? Intellectual, physiological difference, just like in school. The guys that got the best grades were the ones that performed the best. You look at history, the history speaks for itself. The white people have always created and [1352] maintained civilization. The black people have not done anything, and today they are breeding, breeding at a rate that will soon make the white people extinct.

Q: Does that upset you?

A: Yeah. We're talking about our survival.

Q: Did you ever decide to do something about that?

A: Yes.

Q: What did you decide to do about that?

A: Decide to take up arms against them.

Q: You used the expression declaring war some few minutes ago. Tell us what you meant when you joined the American Nazi Party, what did you mean, Frank, by declaring war?

A: The state of war has existed between the system and between those of us who believe as I believe ever since 1933.

Q: What happened in 1933?

A: In 1933 a lot of lives were liberated, the first branch of the white people from the yoke of servitude, they were suffering under the regime of the Chancellor of the German nation.

Q: And what was the name of the political party?

A: The National Socialist German Workers Party. [1353]

Q: What was the name of the party that you said something about the yoke of, whatever it was, what was the name of that party that had been in power?

A: Well, I don't recall the exact name of the party, but I know what they stood for.

Q: All right. What happened particularly in 1933? How did the transgression come about from this yoke of tyranny or whatever to the liberated Hitler party that you told us about?

A: The German people are tired of living under slavery. They wanted freedom, so they supported a man who gave them what they wanted and he was freely and duly elected to power.

Q: And you agree with that?

A: Sure. That's how this country came into existence. We didn't want to be under British rules, so we got together and we had a revolution, the same thing they did over there.

Q: And you agree then with the revolution?

A: There is nothing unAmerican about it.

Q: Is there anything that Hitler did that you don't agree with? [1354]

A: Well, maybe a few small things I don't agree with.

Q: Can you think of one?

A: No.

Q: You started to tell us about a decision you made somewhere along the way to take up arms?

A: Yes.

Q: What do you mean by that?

A: Take up arms means just what it says, take up arms.

*** [1362]

Q: So you had the force do it for you, the force of the gun powder, the force of the projectile, some inner force of what, can you explain what you mean a little bit better?

A: The force of God.

Q: The force of God?

A: With God all things are possible.

Q: With God all things are possible?

A: Even a blind man can hit a target if he is helped by God.

Q: A blind man, if he has the help of God, he can hit a target?

A: Definitely.

Q: Frank, do you believe in God?

A: Yes. [1363]

Q: One God or a number of Gods?

A: One.

Q: One God?

A: Yes.

Q: How do you rate Adolf Hitler and God at the same time, do you compare them at all?

A: Sure.

Q: And what is your comparison, what is the comparison in your mind?

A: I think Adolf Hitler was like Jesus Christ. He was the greatest man in the last two thousand years of man's history

and he wouldn't have done the things he did unless God was helping him to do them.

Q: You say Adolf Hitler then, you see Adolf Hitler then as being, your philosophy is Adolf Hitler is an agent of God?

A: Definitely.

Q: You predicate that on the argument that he could not have done the things he did unless he had some divine intervention?

A: Definitely.

Q: What is your relationship with God?

A: We have a good relationship. It's personal.

Q: It's a personal relationship? [1364]

A: Yes.

Q: Can you tell us about it?

A: No.

Q: You told us about Adolf Hitler getting some help from God, about the inner force, the blind man being able to hit the target. Have you ever felt that you were an instrument of God or you were getting assistance, divine assistance?

A: Sure.

Q: And when do you feel that, Frank? How long have you felt that?

A: A long time ago.

Q: Did you feel this on February 1st, 1982?

A: Yes.

Q: You had taken up arms on that day, hadn't you?

A: I did.

6/19/07

No. 06-1535

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2006

MARC C. HOUK, Warden,

PETITIONER,

-vs-

FRANK J. SPISAK, JR.,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding.

The Respondent, Frank *G.* Spisak, Jr., aka Frances Anne Spisak, is misnamed in the Petition as Frank *J.* Spisak, Jr. Spisak is an inmate in Ohio sentenced to death.

The Petitioner is Stuart Hudson, warden of the Mansfield Correctional Institution, where all mentally ill death row inmates are housed. Spisak, due to his ongoing mental illness, is housed there as well. Stuart Hudson is the present warden of the Mansfield Correctional Institution and replaced Betty Mitchell, Defendant-Warden below. Due to his ongoing mental illness, Spisak has never been held at the Ohio State Penitentiary (O.S.P.). As such, Marc C. Houk, the Warden of O.S.P., is not properly named as Petitioner.

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Ohio Rules of Court. Code of Professional Responsibility, Canon 6, available at http://www.sconet.state.ohio.us/Rules/professional/default.asp#c6

STATEMENT OF THE CASE

There are aspects of Petitioner's Statement of the Case that are factually misleading as relates to the summarizing of the record specific to Petitioner's second issue, the ineffective assistance of Spisak's counsel. These facts and omissions will be addressed specifically in Respondent Spisak's reply.

In section C of Petitioner's Statement of the Case, it is noted that the Supreme Court of Ohio "reviewed and rejected all of Spisak's claims on the merits." While this is correct, it should be noted that the Ohio Supreme Court's decision gave no analysis or reasoning for any of its rulings in denying Spisak's numerous claims. Rather Ohio's Supreme Court merely grouped issues together and denied them with undifferentiated string-citations. Pet. App. 246 a.

The Sixth Circuit granted relief on two separate grounds: the specific jury instructions and forms used at the mitigation phase of the case violated *Mills*, and the ineffective assistance of counsel at mitigation. These grounds are separate and independent and both result in sentencing phase relief.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to Spisak's *Mills* Claim.

1. The Sixth Circuit Properly Reviewed This Matter Pursuant to AEDPA.

The Sixth Circuit's decision-making process fully comports with established *habeas* law and AEDPA. There is no conflict among the circuits applying such well established principles. In granting relief, the Sixth Circuit properly addressed the jury instruction analysis by the Ohio Supreme Court under §2254(d)(1), while acknowledging both the AEDPA's presumption of correctness standard and the "special deference" due state court findings. In fact the Circuit outlined the AEDPA standards and requirements as a precursor to the merits review. Pet Apx. A-8a-9a.

Petitioner recognizes that the Court cited the proper standards but argues that the Court failed to actually apply the standards. (Pet. 19). It is well established that when a court cites the correct legal standard it is presumed that the court actually applied that standard. "There is no principle of law better settled, than that act of a court of competent jurisdiction shall be presumed to have been rightly." *Harvey v. Tyler*, 69 U.S. 328, 344 (1864). *Moragne v. States Marine Lines*, 398 U.S. 375, 378 n.1 (1970). *See also Bell v. Cone*, 543 U.S. 447, 455-56 (2005); *Parker v. Dugger*, 498 U.S. 308 (1991); *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002); *LaVallee v. Delle Rose*, 410 U.S. 690, 694-695 (1973) (per curiam). Petitioner-Warden's argument is nothing more than a disagreement with the conclusions reached by the Sixth Circuit Court. The decision makes clear that the Circuit Court thoroughly reviewed and evaluated the totality of the instructions, the state court decisions, and, applying the proper AEDPA standards, determined not only that the instructions violated *Mills v. Maryland*, 486 U.S. 367 (1988), but that the state court's determination to the contrary was unreasonable given the facts.

> The Ohio Supreme Court's treatment of this issue on direct appeal was limited to:
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> In propositions of law one, nineteen, fifty-four through fifty-six, sixty-two and sixty-four, appellant raises arguments which have previously been raised and rejected in the following cases: *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, certiorari denied (1985), 472 U.S. 1032; *Maurer, supra*; *State v. Bueli* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795, certiorari denied (1986), 479 U.S. ___, 93 L. Ed. 2d 165; *State v. Williams* (1986), 23 Ohio St.3d 16, 23 OBR 13, 490 N.E.2d 906, certiorari denied (1987), 480 U.S. ___, 94 L. Ed.2d 699; and *State v. Steffen* (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383.

(Pet. Apx. 246a). The *Mills* error was raised to the Ohio Supreme Court in Proposition of Law No 54 (Pet. App. 80a). The Sixth Circuit gave this decision all the "deference" it was due.[1]

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[1]Arguably Spisak was entitled to *de novo* review because the Ohio Supreme Court opinion prevents unreasonable application of federal law review. That is because the court's opinion did not identify what law the court actually applied or its reasoning. It is not possible to determine whether or not the underlying decision was an "unreasonable application" of clearly

2. The Circuit's Opinion is a Straight-Forward Application of this Court's Precedence in *Mills v. Maryland*, 486 U.S. 367 (1988).

Contrary to Petitioner Warden's claim, the Sixth Circuit's opinion is nothing more than the straight-forward application of *Mills* to the jury instructions and forms used in Spisak's trial. The core holding of *Mills* is simply that if the jury instructions and/or forms prevented a single juror from giving effect to mitigating evidence those instructions and forms violate *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The instruction given is identical in its impact to the instruction given in *Mills*. Looking at the instructions actually given demonstrates that the jury was repeatedly addressed in the collective and instructed that every decision was to be the decision of the jury. The constitutional question is "whether a reasonable jury would have interpreted the instructions in a way that is constitutionally impermissible." *Mills v. Maryland*, 486 U.S. at 375 376. "The question, however, is not what the State Supreme Court

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established federal law since the court gave no indication of what law was applied. A state court must be aware of the federal law and attempt to apply it before there can be a determination that there was an unreasonable application of that law to the facts of the case. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). The "unreasonable application" clause of the AEDPA is only applicable when the state court actually "identifies the correct governing legal rule." *Id.*

Federal courts may make a determination that a state court ruling is "contrary to" clearly established federal law even in the absence of any citation to or even awareness of clearly established Supreme Court precedent. *Early v. Packer*, 537 U.S. 3 (2002). *See also Mitchell v. Esparza*, 540 U.S. 12, 16 (2003)(reviewing only "contrary to" standard); *Bell v. Cone*, 125 S. Ct. 847 (2005) (same). The Court, however, has not applied this same reasoning to "unreasonable application" review under the AEDPA. Given the impossibility of determining whether an unexplained state court decision is an unreasonable application of clearly established federal law, the constraints of the AEDPA cannot limit federal court review.

A contrary policy or statutory interpretation would permit a state court to insulate its decisions from federal review by simply denying relief without any explanation of its reasoning or the cases it relied on. The federal courts would then be left to determine whether a decision was an unreasonable application of law without any guidance as to whether the state courts were aware of or attempted to apply the correct law. This situation would upset the traditional balance between state and federal courts established by principles of comity and would result in a suspension of the Writ and render the AEDPA provisions void and unconstitutional.

declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom [v. Montana]*, 442 U.S. [510], at 516 517 [1979](state court "is not the final authority on the interpretation which a jury could have given the instruction")." *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985). The constitutional question is whether a reasonable juror could have understood the instructions and/or verdict forms to require unanimous finding of mitigating factors before considering a life sentence. As such it is important to address the possible interpretations of the jury instructions, not what the Petitioner-Warden, or even this Court, think the instructions mean. *Mills v. Maryland*, 486 U.S. at 375-76.

As in *Mills* every instruction given to the jurors advised them that every decision they made had to be unanimous and addressed the jury as the collective "you" rather than individually. Immediately after being told to unanimously determine that death was the proper sentence the jury was instructed that "if you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances . . . outweigh the mitigating factors, you will then proceed to determine which of the two possible life imprisonment sentences to recommend." (Pet. Apx. 262a-263a). It must be presumed that the jury would understand the unanimity requirement to apply to every decision since there was never a contrary instruction. *Mills*, 486 U.S. at 378-379. There is simply nothing in the jury instructions or the verdict forms that suggests the unanimity instruction did not apply to every single jury determination, including the existence of mitigating factors or the impact of that evidence. The totality of the jury instructions were such that the reasonable juror could have understood the charges as meaning that a death sentence had to be unanimously rejected before a life sentence could be considered. As in *Mills*, the impact of this instruction is to preclude each individual juror from individually giving effect to the mitigation evidence.

It is possible that the jury properly understood and applied the instructions but it is just as possible that the jury was mislead and misapplied the law. Given the high degree of certainty required in capital cases, *see Andres v. United States*, 333 U.S. 740, 752 (1948), there is substantial probability that a juror in this case was prevented from independently considering and giving weight to mitigation evidence as required by *Lockett* and *Eddings*. Therefore, the resulting death sentence is unconstitutional. *Mills*.

Nor did the Court err in citing this Court's post-*Mills* opinions or circuit cases. The Court's citation to *McCoy v. North Carolina*, 494 U.S. 433 (1990), simply illustrated the *Mills* error.

> Rather, *Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence in deciding Issues Three and Four: whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death. Under *Mills*, such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance under Issue Two.

This is the exact analysis engaged in by the Circuit and demonstrates how the state court decision is contrary to and/or an unreasonable application of *Mills*. Therefore, the Petition for a Writ must be denied.

3. There is no conflict between the Circuits.

Respondent's claim of a circuit conflict is simply incorrect. Every case relied upon by Respondent demonstrates that the Circuits are consistent in applying *Mills*. The Circuits consistently review the instructions as given in light of *Mills* and evaluate whether those instructions violate the constitution because there is a possibility a reasonable juror may have been precluded from giving effect to mitigating evidence because of the unanimity instructions. *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999). *See also Zettlemoyer v. Fulcomer*, 923 F.3d 284, 307-08 (3rd Cir. 1991);

Arnold v. Evatt, 113 F.3d 1352, 1363 (4th Cir. 1997). Rather than demonstrating a conflict, these cases demonstrate compliance with *Mills* and the individual consideration required by the Constitution and this Court.

Nor is there a conflict within the Sixth Circuit itself. There are cases that reach a different conclusions, that is grant or deny the Writ, on *Mills* issues. However, those cases again demonstrate that the Circuit is properly reviewing the issue under *Mills*. That is, the Court reviews the specific instructions and verdict forms given in individual cases as well as the specific law of each state and determines whether those instructions comply with *Mills*. *See Coe v. Bell*, 161 F.3d 320, 337-38 (6th Cir. 1998) (reviewing Tennessee jury instructions). In fact the Circuit clearly rejected the Warden's claim of some intra-circuit conflict. In *Williams v. Anderson*, 460 F.3d 789, 810-13 (6th Cir. 2006), the Court went to great length to explain exactly why there is no conflict.

Contrary to Petitioner-Warden's assertion of a new rule the Sixth Circuit created no rule that Ohio must give some specific instruction. How Ohio chooses to comply with *Mills* is left to Ohio.[2] The Circuit simply evaluated the instructions actually given in Spisak's case in light of *Mills* and determined that the instructions as given failed to comply with this Court's precedent. Ohio remains free to require unanimous "verdicts" but is must ensure that the unanimity instructions do not apply to mitigating factors. If Ohio's instruction in this case had done that, the Circuit would have denied relief.

There is no conflict, either intra-Circuit or between the Circuits. The application of *Mills* to specific cases will naturally result in different outcomes as the instructions and forms used vary from

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[2]It must be noted that the Ohio Supreme Court subsequently determined that the "acquittal first" instruction given in this cases violates both Ohio law and *Mills*. *State v. Brooks*, 75 Ohio St. 3d 148, 159-62, 661 N.E.2d 1030, 1040-42 (1996)

jurisdiction to jurisdiction and even within specific jurisdictions. Rather than demonstrating a conflict, the difference in outcomes demonstrate a straight forward application of *Mills* to the specifics of the individual cases. Therefore, the petition should be denied.

4. Conclusion

For the reasons outlined above, the petition for a writ of certiorari should be denied.

B. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents to Spisak's ineffective assistance of counsel claim.

1. The Petition fails to note that the Ohio Supreme Court's decision on the merits was unreasoned and unanalyzed

There is no reason for granting the writ as to Spisak's ineffective assistance claim, given that the Sixth Circuit properly reviewed the record, applied deference under the AEDPA to the state court decision, and enunciated its reasons pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). It is the Petitioner's brief that evades discussion of the full record, which, as will be demonstrated, clearly supports the Sixth Circuit's analysis. It should be noted at the outset that the 'deference' that Petitioner seeks to enforce is hardly deserved, given the Ohio Supreme Court's ruling, which is completely unreasoned and unanalyzed, and without even the slightest hint as to what facts, if any, were being considered in denying Spisak's claim. App. 247a. (Referencing Proposition of law 57, Spisak's ineffective assistance at mitigation claim). In short, the Ohio Supreme Court's perfunctory un-analytic decision itself undermines Petitioner's argument that the Sixth Circuit's conclusion is 'clearly erroneous' and "gives too little deference to the state courts." Pet. 14.

2. Additionally, By Failing Analyze the Full Context Within Which Trial Counsel Heaped Contempt and Disdain upon His Client, the Petitioner Misrepresents the Factual Basis of the IAC Claim.

In the Petitioner Warden's Statement of the Case only a few generalized quotes from trial counsel's closing argument are noted. Pet. 6. As will be discussed within Respondent's analysis, these few quotes do not convey the full tenor of trial counsel's disdainful comments directed towards his client. These omissions allow for Petitioner's benign portrayal of trial counsel's argument at mitigation and allow Petitioner to argue there must have been some underlying 'strategy.' Additionally, Petitioner does not stress that Ohio is a 'weighing' state and as such, there must be mitigation to 'weigh' else the jury is compelled by law to impose a death sentence. The factual basis omitted from Petitioner's arguments demonstrate that trial counsel argued, as a prosecutor, that there was a vast amount of aggravation to weigh and virtually nothing in mitigation to weigh against it.

A review of this full record reveals that the Sixth Circuit properly reviewed the entire record, applied deference under the AEDPA, and concluded that counsel unreasonably breached a duty of loyalty to his client such that there was a 6th Amendment violation that prejudiced Spisak.

3. There Is No Evidence in the Record That Trial Counsel Had a Strategy or That the Sixth Circuit Ignored Such a Strategy.

Petitioner Warden asserts that under *Strickland*, deference "applies all the more to a counsel's closing argument." Pet. 24. Petitioner's argument, however, only addressed counsel's closing argument in mitigation. Confining the discussion to this argument, Petitioner asserts that counsel argued that "Spisak's mental illness was a mitigating factor that the jury should consider," and that counsel "argued extensively that although the defense's expert testimony was insufficient to meet the test of insanity it was more than sufficient for the jury to conclude that Spisak was substantially impaired by mental illness and that this mitigating factor outweighed the admittedly strong aggravating circumstances." Pet. 6

As will be demonstrated, this is a poor characterization of what occurred as the only issue "extensively" argued by counsel was his disdain for Spisak and how brutal non-aggravating, non-statutory aggravating circumstances should be weighed against him.

Even *Yarborough v. Gentry*, a non-capital case cited by Petitioner, acknowledges that "[c]losing arguments should "sharpen and clarify the issues for resolution by the trier of fact." 540 U.S. 1, 6 (2004). Spisak's counsel did not sharpen the issue, which in a weighing state such as Ohio, must be to assess whether the aggravated circumstances outweigh the mitigation beyond a reasonable doubt. Counsel's argument suggested a death sentence was warranted.

a. Arguments by trial counsel that are excluded from the Petition indicate that counsel expressed doubt as to the validity of the mitigation that was offered.

The Ohio Supreme Court noted that counsel offered mitigation solely as to Ohio's mitigating factor R.C. 2929.04(B)(3), "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Pet. App. 250a. Yet, counsel began the mitigation phase by acknowledging in his opening argument that Spisak may not be sick at all. Counsel unreasonably restricted the scope of mitigation itself by arguing that mitigation was limited to a "very, very narrow question. . . [that] is how sick, *if he is sick*, and the mental illness, the mental defect, *if any*, that Frank Spisak *may* have." (Trial Tr. 2417) Counsel concluded the mitigation opening statement with the following: ". . .At the appropriate time you will weigh [the mitigation, which "we will try to show you"]. If you agree with us, fine. If you don't agree with us, you are the jurors." (Trial Tr. 2419). The meaning of these statements is not an equivocal question of context.

Petitioner ignores that in the mitigation closing argument, trial counsel suggested to the jury that there probably was no mitigation:

> You are here, and the issue is to weigh the aggravating circumstances and the mitigating factors, *and before the prosecution rushes to point out, if any, let me add a coma, and say, if any*. That's probably the first thing you have to find. (Emphasis added)
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> Pet. App. 270a.

It is in this context that the analysis of counsel's actions are properly comprehended.

> b. **In this weighing State there can be no reasonable 'strategy' that includes repeatedly misinforming the jury about non-statutory aggravating circumstances that were contrary to Ohio law, and arguing that when deliberating, the jurors should identify with the suffering of the victims and the victim's families.**

Petitioner never addresses that part of the Sixth Circuit's analysis which undercuts the 'strategy' label that Petitioner would seek to apply to trial counsel's unreasonable actions. The Circuit Court reviewed the record and noted that "[m]uch of Defendant's counsel's argument during the closing of mitigation could have been made by the prosecution, and if it had, would likely have been grounds for a successful prosecutorial misconduct claim." Pet. App. 38a. This was not mere rhetoric.

The only aggravating circumstances that can be considered in Ohio's statutory weighing process are those charged and proven beyond a reasonable doubt at the trial's guilt phase. R.C. 2929.03, 2929.04. Ohio law is "well settled that the nature and circumstances of the crime may not be weighed against the mitigating factors." *State v. Williams*, 99 Ohio St 3d 493 (2003), citing to *State v. Wogenstahl*, 75 Ohio St.3d 344, 356, 662 N.E.2d 311 (1996).

For example, the Ohio Supreme Court has repeatedly concluded that it is error to focus closing remarks on the victim's mental anguish, thereby converting the nature and circumstances

of the offense into a non-statutory aggravating circumstance. *Combs v. Coyle*, 205 F.3d 269, 292 (6th Cir. 2000), citing *State v. Gumm*, 73 Ohio St.3d 413, 653 N.E.2d 253, 262 63 (1995), *cert.* denied, 516 U.S. 1177 (1996); *State v. Landrum*, 53 Ohio St.3d 107, 559 N.E.2d 710, 719 (1990), *cert.* denied, 498 U.S. 1127 (1991); *State v. Davis*, 38 Ohio St.3d 361, 528 N.E.2d 925, 931 (1988), *cert.* denied, 488 U.S. 1034 (1989).

In that context, it is objectively unreasonable and falls below prevailing professional norms for counsel not to know what are and what are not statutory aggravating circumstances. *Williams v. Anderson*, 460 F.3d 789, 800 (2006)("Appellate counsel's decision to ignore this substantial body of case law was objectively unreasonable and falls below prevailing professional norms." referencing Ohio Rules of Court, Code of Professional Responsibility, Canon 6, (requiring Ohio attorneys to be familiar with relevant area of practice); *See* Ohio Rules of Court, Code of Professional Responsibility, Canon 6, available at http://www.sconet.state.ohio.us/Rules/professional/default.asp#c6 (last visited April 19, 2006) (requiring Ohio attorneys to be familiar with relevant area of practice).

Rather than reflect some 'strategy', the record reflects that Spisak's counsel encouraged jurors to weigh the following 'aggravating circumstances', which were, as a matter of Ohio law, **not** aggravating circumstances:

> a) ...And we can feel that, or see the cold marble, and will forever, and undoubtedly we are going to see the photographs, we are going to see Horace Rickerson dead on the cold floor. Aggravating circumstances, indeed it is... And, ladies and gentlemen, the reality of what happened on February 1st, such that you can smell almost the blood. You can smell, if you will, the urine. You are in the bathroom, and it is death, and you can smell the death. Pet. App. 271a.

None of those circumstances are statutory aggravating circumstances. See R.C. 2929.04(A); *Wogenstahl*, 75 Ohio St.3d at 356, 662 N.E 2d 311 ("[I]t is improper for prosecutors in the penalty

phase of a capital trial to make any comment before a jury that the nature and circumstances of the offenses are 'aggravating circumstances.'").

> b) ...And we can all know the terror that John Hardaway felt when he turned and looked into those thick glasses [worn by Spisak] and looked into the muzzle of a gun that kept spitting out bullets.. . . And we all went through the surgery, and we were all kind of with John Hardaway when he came in here and he still got some physical problems, and we can all feel those, and we are not going to forget. Pet. App. 272a.
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> c) ...and we all know the terror [of Coletta Dartt], or we can feel that right in the pit of our stomach. (Tr. 2890; JA pp. __). Pet. App. 272a.

Ohio courts have also held that it is improper for prosecutors to speculate about what the victim was thinking. *State v. Combs*, 62 Ohio St.3d 278, 283, 581 N.E.2d 1071(1991); *State v. Wogenstahl*, 75 Ohio St.3d at 357-758, 662 N.E.2d 311 (1996).

> d) ...on the 27th of August we were in another lavatory, and we were all there because we could smell the death. And we could smell the latrine smells, and we could feel the cold floor. And we can see a relatively young man cut down with so many years to live, and we could remember his widow, and we certainly can remember looking at his children, and we certainly can feel all of the things that they felt, because ladies and gentlemen we participated, and we were there. Pet. App. 272a.- 273a.
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> e) ...There are too many family albums. There are too many family portraits dated 1982 that have too many empty spaces. And there is too much terror left in the hearts of those that we call lucky. Coletta Dartt and John Hardaway. We call them lucky [because they survived]. Lucky, if you have a nightmare that will never go away. That's lucky, it may be, but its an aggravating circumstance. Pet. App. 273a

The suffering inflicted upon the families of the homicide victims is similarly improper and would not have been admissible if offered as evidence, *State v. Williams*, 99 Ohio St.3d 493 (2003), citing generally to *State v. White*, 85 Ohio St.3d 433, 445-446 (1999), nor would a prosecutor's invocation of it in argument have been proper. *Id.*, citing to *State v. Reynolds*, 80 Ohio St.3d 670, 679 (1998).

And while Petitioner cites passages and speculates that trial counsel used pronouns like "we" and "us" as a way of "sympathiz[ing] with the jury's emotional response to sitting through such a

difficult trial," (Pet. 28), Petitioner ignores the comments of record in which counsel used "we and "us" to have the jury identify *with the victims* themselves.

> e) ...[O]n the 30th of August, nearly a year ago, you and I and everyone of us, we were sitting in that bus shelter, and you can see the kid, the kid that was asleep, the kid that never knew what hit him, and we can feel that bullet hitting, and that's an aggravating circumstance. Pet. App. 273a.
>
> f) ...We were with [Spisak] when he stalked this kid that never got any older than 17. And we were with him when he fired the gun six times, shot him through the head. And we were there when that straw hat fell off. And, ladies and gentlemen, would you ever want any more aggravating circumstances? I don't think that you would. Pet. App. 273a.

By incorrectly informing the jury that the nature and circumstances of the homicides and shootings *were* aggravating circumstances, trial counsel invited the jury to identify with the victims and weigh those non-statutory aggravators against the mitigating factors.

Arguably, most egregious of all, was counsel's argument that the jurors should also identify with the suffering inflicted upon the families of the homicide victims.

> g) ...Turn and look at [Spisak]. And let me suggest to you, and we are talking about aggravating circumstances, if each drop of blood in this sick demented body were full of atonement for the anguish, the terror, the aggravating circumstances that we have seen here, ladies and gentlemen, it wouldn't be enough. It wouldn't be enough to repay. It wouldn't be enough because there are too many empty places in those 1983 family portraits. And there was too much life left to live for Timothy Sheehan, Horace Rickerson and Brian Warford. Pet. App. 275a.

As a final unreasonable act, trial counsel then drew the jury's attention to the victims' families, who were seated inside the courtroom, and argued to the jury that their sentencing decision was "awfully important" to them:

> My God, you've looked in the back of the courtroom, and there are some people sitting right there, right back there now, and you know who they were. And you know that their lives have been tremendously affected, and you know that they are torn up. And it is important. And it is awfully important what you do. Pet. App. 293a.

Such 'vivid' and incendiary oratory violates the principle that a capital sentence should be imposed as a "'reasoned *moral* response'" *Cf. Penry v. Lynaugh*, 492 U.S. 302, 319-328 (1989)

(quoting *California v. Brown*, 479 U.S. 538 (1987); *See also State v. White*, 15 Ohio St.2d 146, 445-446 (1968) (holding that testimony designed to show the suffering of grieving survivors is not admissible because it focuses the jury's attention on prejudicial matters which are outside their function as triers of fact); *State v. Reynolds*, 80 Ohio St.3d 670, 679 (1998).

Being a weighing state, the Ohio statute and case law make clear that there can be no evidence introduced or argument made about non-statutory circumstances. *State v. Jenkins*, 15 Ohio St.3d 164, 207 and 215 (1985), *cert.* denied 105 S.Ct. 3514 (1985), reh'g. den. 106 S.Ct. 19 (1985); *State v. Johnson*, 24 Ohio St.3d 87 (1986); *Barclay v. Florida*, 463 U.S. 939 (1983). Yet, as the Sixth Circuit realized, this is precisely what Spisak's counsel did by encouraging the jurors to factor into their weighing deliberations a slew of non-aggravating circumstances.

c. In this weighing State there can be no reasonable 'strategy' that includes telling the jury that non-statutory aggravating circumstances such as the "likely revulsion" that the jury probably felt for Spisak's beliefs were actually aggravating circumstances.

Petitioner speculates that trial counsel had a strategy of trying to gain the jury's trust by "empathizing with their likely revulsion by the . . . reprehensibility of Spisak's Nazism [sic]." Pet. 25. However, the record reflects that counsel's references during the closing argument in the mitigation phase of the trial were not a mere effort to empathize, but rather are properly characterized as advocacy suggesting that the hatred espoused was itself part of the aggravating circumstances to be weighed:

> . . . And, Ladies and gentlemen, that's what you have got to weigh, the aggravating circumstances against the mitigating factors. And you heard the hate, and you heard the misguided philosophy, and if you live another ten years, or twenty years, or fifteen years, or fifty years, you are always going to be another Spisak juror, among other things, because isn't what you heard kind of a microcosm, and some of us, not all of us, are old enough to remember. Isn't what you heard just a microcosm of a twelve year reign of terror that was unparalleled in history, the Third Reich, and it was going to last for a thousand years.
>
> And those clown couldn't buy 12 or 13.

> . . . And listen to this sick distorted mind, and you will hear once again kind of a muffled dissent, but those hobnail boots on the cobblestone streets, but ladies and gentlemen, one thing you won't hear, and one thing even the sick distorted minds don't admit, you won't hear the gas at Buchenwald, and you won't hear the gas in Auschwitz, because ladies and gentlemen, it never made any noise in killing six million.
>
> Aggravating circumstances, all the aggravating circumstances you ever want.

Pet. App. 274a.

This was a clear misstatement of Ohio law.

d. In a weighing State, it is also objectively unreasonable for counsel to argue that the Client is not worthy of any mitigation.

Petitioner acknowledges that although trial counsel argued that Spisak did not lead a "good life" and had no "good deeds" to his credit, counsel did assert that "mental illness was a mitigating factor that juror should consider." Pet. 25. Petitioner referenced counsel's telling the jury that we are a "humane society." Id.

Using those references to attack the Sixth Circuit's analysis, Petitioner argues that "there is no statement by counsel in the closing argument that Spisak "was undeserving of mitigation." Pet. 27. This is blatantly incorrect. The Petitioner's abbreviated references fail to convey the true context within which counsel argued.

First, counsel's argument denigrated Spisak to the point of suggesting his future dangerousness, which became a springboard for providing the jurors with reasons to discount any and all mitigation that might be offered on Spisak's behalf:

> Now, the Judge has told you about mitigating factors. . . . The Court has told you that, or the Court will tell you that the defense on this portion could bring forward, and bring to you anything that the defense might consider to be mitigating, good deed that a person might have done, an otherwise good life.

> Sympathy, of course, is not part of your consideration. And even if it was, certainly, don't look to him for sympathy, because he demands non. And, ladies and gentlemen, when you turn and look at Frank Spisak, don't look for good deeds, because he has done none. Don't look for good thoughts, because he has none.
>
> And, ladies and gentlemen, don't look to him with the hope that he can be rehabilitated, because he can't be. He is sick, he is twisted. He is demented, and he is never going to be any different.
>
> The question then comes up, ladies and gentlemen, is there any mitigation. Is there any reason for you, ladies and gentlemen, to go back to your jury room, . . . and to do anything other than to recommend to this Judge that at the earliest possible time he be strapped in the chair and electrocuted.
>
> Well, there is only one reason, ladies and gentlemen, pride. It is not within Frank Spisak, it lies not within Frank Spisak, but within ourselves. . . . It is the reason that you get that little bit of a flutter when you hear them play the star Spangled Banner, because, ladies and gentlemen, we are different. We are a humane society.

Pet. App. 275a - 276a.

Counsel's argument that the *only* mitigation was to be found within the jurors themselves, and that Spisak had no redeeming qualities was objectively unreasonable in a weighing state like Ohio. The Sixth Circuit correctly analyzed that "there cannot be any objectively reasonable tactical reason to argue to the jury in a mitigation phase that one's client has no redeeming qualities, will never be rehabilitated, has never done a good deed, is not deserving of sympathy, and is entitled to no mitigation." Pet. App. 38a.

Demonstrating that trial counsel's argument was more disdain than specific strategy is the fact that counsel knew that the comment about Spisak "never going to be any different" was false. During Spisak's pre-trial competency hearing, the State's expert, Dr. Resnick, acknowledged that "[Spisak's] thinking *has improved substantially since he has been incarcerated.*" (Trial Tr. 20) **JA 824,** In fact, there was nothing in the record to suggest that Spisak could not be rehabilitated. Trial counsel's argument to the jury was, therefore, not only factually untrue, but it destroyed one

powerful mitigation argument, *i.e.* that the structured setting of a long prison sentence could improve Spisak's mental illness. Counsel did not utilize this information or argument at mitigation.

Additionally, counsel's comment about Spisak never having done a good deed or had a good thought was also disdainfully misleading given that counsel failed to raise the statutory mitigating factor that the Spisak had no prior criminal record under. R.C. 2929.04(B)(5). There could be no strategic reason for failing to assert this mitigating factor and had counsel done so it would have emphasized the severity of the mental illness active at the time of the homicides.

Petitioner's arguments are simply a disagreement with the characterization of the evidence as reviewed by the Circuit Court. Contrary to the implication of Petitioner's general argument, (*se* Pet. 26, arguing that counsel "extensively" argued that Spisak was substantially impaired by mental illness, citing to Pet. App. 278a - 288a), the Sixth Circuit's specific review of the record notes that trial counsel's "final moments were not devoted to a discussion of the reasons why Defendant's mental illness made him deserving of mitigation, but rather to discussing all the other participants in the trial. Namely, trial counsel discussed the jurors, lawyers, the judge, policemen, and the victims' families, and focused on the importance of the jury's decision to all of these various individuals, instead of arguing how and why the mitigating factors outweighed the aggravating factors." Pet. App. 37a.

A review of counsel's argument demonstrates that that not once did trial counsel ever discuss how the jurors might find that the aggravating circumstances did not outweigh the mitigating factors.

Strickland recognized that merely invoking the word 'strategy' to explain errors was insufficient since "particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances. at 691, 104 S.Ct. at 2066. In considering *all* the circumstances, it become clear that counsel's comments at mitigation were indeed disdainful and contemptuous of Spisak

rather than some un-enunciated 'strategy.' Completely ignored by Petitioner are other comments by counsel demonstrating the disdain he harbored for his client.

e. The record reflects counsel's breech of loyalty to Spisak beyond the closing mitigation argument.

"The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Penson v. Ohio*, 488 U.S. 75, 86-87 (1988), quoting *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948). *Strickland*, 466 U.S. at 688, held that "[r]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes a duty of loyalty" to the client.

That Spisak's trial counsel's disdain during mitigation closing argument was a primary focus is not mere rhetoric.

During the culpability phase, for example, defense counsel himself disdainfully referred to Spisak a 'fag'. (Trial Tr. 2920). **(JA 3093)**.

This bears mentioning for two reasons. First, Spisak's mental illness mitigation was anchored in his gender identity disorders. (*See* Pet. 5. Petitioner's sole reference to this, noting mitigation witness Dr. Sandra McPherson's diagnosis of Spisak's Schizotypal and Borderline Personality Disorders "characterized by bizarre and paranoid thinking, gender identification conflict and emotional instability."). When mitigation expert Dr. Bertschinger was testifying, counsel commented: "Just the fact that someone might think about a sex change, and the fact that sex changes are generally the subject of jokes and laughter, *and reasonably so*--" (Trial Tr. 2566) (JA 2739)

Secondly, the gender identity disorders explained, in mitigatory fashion, the Nazi-identity that Spisak had assumed, and for which counsel had so expressed his disdain, as noted above. For example, in a pre-trial competency and sanity report generated by the Trial Court's Clinic, which

was proffered for the record, a psychological profile was given that sympathetically detailed severe Spisak's gender identity disorders and explained the relationship with the structured identity Spisak found in the Nazi order:

Excerpt from Dr. Koerner and Dr. Samy's 5-27-83 report:

... Mr. Spisak appears to be an emotionally stunted individual with a high need to feel in control and [sic] fear of inadequacy and vulnerability. He tends to view the world in an over simplistic manner and he aligns himself with ideologies that legitimize his feelings of alienation and fear. He vacillates between identifying with groups that espouse these socially deviant beliefs and with being a loner. He has a very poorly formed concept of his identity as an adult. In general, his identification with deviant groups and researching beliefs that agree with his view of the world appear to sufficiently allow him to intellectually distance himself from his feelings of alienation, fear, and inadequacy. However, in stressful situations such as his divorce and loss of his job, his belief system is not adequate to shield him from the aforementioned emotional states. He apparently attempts to regain feelings of control and power through more intense violent fantasies and through acts of violence.

* * *

... [Mr. Spisak's] mother was bossy and somewhat of a dictator. He used to see her as an image of Hitler. His father was a passive person. This situation probably affected the development of his gender identity. He did not want to be like his father. He wanted to be strong like his mother and be a leader. At the age of 20, he developed a feeling that he was lost, that he did not belong to the existing world (society) and asked himself "who am I?" Everything- people, shops, etc., looked strange to him...

... It is clear that the contrasting personalities of his parents as well as reading about Hitler resulted in the development of an Identity Disorder manifested in conflicts about himself, his goals, sexual orientation, group loyalties, etc., and the development of Gender Identity Disorders manifested by Transvestism and Transsexualism.

* * *

Mr. Spisak developed Identity Disorders which affected his way of life and resulted in the development of social, occupational and marital problems. He was aware of that and he stopped wearing female clothing to get his wife back. He was also affected by his mother's strong personality and wanted to be like her, but was unable to achieve a "boss" position as she did. He tried to gain some strength by joining the Nazi Party, but this did not help him in his attempt. This failure aggravated him and he blamed others for his problems...

... At a later time, he adopted the plan to kill black people. To justify that, he adopted the theory that he wanted to make room for the white people. Although it might sound ridiculous, it became an established idea in his mind...

Cross-Cert. Pet. Apx. 1143a - 147a.

Excerpt from Dr. Althof's Psychological Evaluation report:

> In structured situations, Mr. Spisak's thought processes ranged from logical, intact, efficient and adaptive to self-referential, loose, peculiar and strained. In less structured situations, his thinking was generally of poorer quality ranging from adequate to over fabulized, frankly paranoid, illogical and autistic. Paranoid obsessions were noted, focusing on hatred of Blacks, sadistic morbid fantasies of dead babies and identifications with powerful Nazi figures. Emotionally ladden [sic] stimuli resulted in the disruption of logical thinking and the intrusion of fused primitive highly charged sexual and aggressive impulses. Additionally, abstract thinking ability was significantly and consistently compromised.
>
> * * *
>
> One can speculate that underlaying Mr. Spisak's multiple ego dysfunctions are struggles to control his massive primitive inner rage and to come to grips with his sexual identity confusion. Mr. Spisak projects his unacceptable sexual and aggressive impulses onto Blacks. He then perceives them as powerful, aggressive, evil and seductive. Consequently, Mr. Spisak feels hate, fear, and envy for Blacks coupled with an inner sense of inadequacy, vulnerability and sexual confusion. His quasi political identifications serve as an obsessive- paranoid defense mechanism, whereby he wards off, albeit unsuccessfully, his projected aggression, inadequacy and sexual confusion.
>
> Cross-Cert. Pet. Apx. 1151a.

The Sixth Circuit's decision gives a rather brief summary of the mitigation phase evidence that was presented through the presentation of mitigation phase witnesses. Pet. Apx. 39a - 42a. Significantly, lead trial counsel made no specific references to any aspect of Spisak's mental illnesses in his mitigation closing argument.

In reversing the District Court, the Sixth Circuit noted that the lower court "had reasoned that once counsel identified with the[] [juror's] emotions towards Defendant, he could then explain to them that their feelings were misplaced because Defendant was mentally ill." Pet. App. 36a. The Sixth Circuit acknowledged: "Had Defendant's trial counsel actually done the latter, and spent a substantial amount of time humanizing and rehabilitating Defendant in the eyes of the jury be arguing that Defendant was misguided or mentally ill and deserved to have his life spared, then the district court might be correct that this was permissible strategy." Id.

However, upon reviewing the record, the Sixth Circuit correctly concluded, that "[t]he record reveals, however, that trial counsel did very little to offset the negative feelings that his own hostility and disgust for Defendant may have evoked in the jury." Id. It is telling that Petitioner never directly challenges this assertion with references to the record. Rather, the Petitioner simply disagrees with the Sixth Circuit's conclusion.

4. The Sixth Circuit Gave Deference to the State Court's Unreasoned Decision.

A review of the facts not noted by Petitioner suggests that it is the Petitioner and not the Sixth Circuit that has taken a "selective view of the record." Pet. 26-27. There is nothing about the Sixth Circuit's analysis that is in anyway the "hindsight approach condemned by *Strickland*." Id., at 27. Petitioner's argument that the Sixth Circuit did not "apply the appropriate deference," Pet. 26, is belied by the Circuit's decision itself.

As the Sixth Circuit analyzed, "[i]n light of all the circumstances of this case, and even conceding that counsel faced some unique challenges, we still find that Defendant has rebutted the "strong presumption" that counsel's actions constituted "sound trial strategy."

5. Conclusion.

For the reasons outlined above, the petition for a writ of certiorari should be denied as to this issue.

C. Conclusion.

For the above stated reasons, Spisak requests the Court deny Petitioner Warden's petition for *certiorari*. The Warden's petition misrepresents the scope and analysis of the Sixth Circuit's decision and opinion. The Sixth Circuit's decision creates no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor does it provide any other reason to warrant

revisiting these well and clearly-established areas of the law. Therefore, Petitioner Warden's petition should be denied.

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FILED
SEP 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1535

In the Supreme Court of the United States

STUART HUDSON, Warden,

Petitioner,

v.

FRANK G. SPISAK, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Sixth Circuit noted, but failed to apply, the deference owed to state court decisions under 28 U.S.C. 2254(d). Instead of asking whether the Ohio Supreme Court's decision was contrary to or an unreasonable application of *Mills v. Maryland*'s rule that jury capital sentencing instructions cannot require unanimity as to each mitigating factor, see 486 U.S. 367 (1988), the panel invoked a new rule created by the circuit court to declare that Spisak's jury instruction requiring unanimity in the ultimate verdict was somehow unconstitutional. This decision not only does not properly defer to the state court, but also improperly interprets *Mills*. Further, in reviewing Spisak's ineffective assistance of counsel claim, the Sixth Circuit did not take into account the wide latitude afforded defense counsel in presenting sentencing phase closing arguments.

Spisak responds that the Sixth Circuit correctly deferred to the state court decision because it cited the right rule of deference. Mere citation without proper application, however, is error, and perhaps recognizing this, Spisak also argues for a new rule that declares state-court merits decisions are not entitled to AEDPA deference if the opinions are too short. But the Court has never held that a state-court merits opinion is not entitled to AEDPA deference because of its brevity, and federal circuit courts across the country have held the contrary.

Nor does Spisak's discussion of the merits of his claims respond adequately to the Sixth Circuit errors identified in the State's petition. Spisak ignores the obvious factual distinctions between *Mills* and this case. And despite his blanket denial of an inter-circuit or intra-circuit split, Spisak offers no way to reconcile the decision below with existing circuit precedent that has denied habeas relief on indistinguishable facts.

As to Spisak's ineffective assistance claim, Spisak cannot rebut the State's argument that particularly wide latitude should be given to counsel in presenting closing arguments. Instead, Spisak improperly attempts to expand the issues before the Court by asserting new theories of counsel's ineffective assistance. The claims bear no relation to the theory upon which the Sixth Circuit granted relief, and cannot form a basis for upholding the decision below.

Before further discussing these issues, however, the State notes that Frank G. Spisak is incarcerated at Mansfield Correctional Institution, not at Ohio State Penitentiary as incorrectly stated at Page ii of the State's petition. The Warden at Mansfield is Stuart Hudson. The case caption has already been corrected by letter to the clerk of the Court on July 6, 2007, to reflect the correct name of the Warden.

A. The Court should review and reverse the Sixth Circuit's grant of habeas relief on Spisak's jury instruction claim.

1. The Sixth Circuit's failure to apply AEDPA is not absolved by its recitation of the AEDPA standard or by the state court opinion's brevity.

Spisak first erroneously contends that the Sixth Circuit correctly applied AEDPA deference because it cited AEDPA in its opinion. But the Court has made clear that the test for AEDPA compliance is the correct application of the standard, not merely its recitation. *Rice v. Collins*, 126 S. Ct. 969, 973 (2006) ("Though it recited the proper standard of review, the panel majority improperly substituted its evaluation of the record for that of the state trial court."); *Price v. Vincent*, 538 U.S. 634, 639 (2004) (reversing the Sixth Circuit for reciting the AEDPA standard but then "proceed[ing] to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"). The lower court's *analysis* matters; its citation of the right test does not overcome its failure to follow that test.

Spisak seems to implicitly recognize the circuit court's dearth of AEDPA analysis, and now offers his own new rule of habeas review. That is, he insists that the panel gave the state court decision "all the 'deference' it was due" in light of the Supreme Court of Ohio's brevity. See Cert Opp. at 2–3. Spisak suggests that the Court should hold that state-court merits decisions are not even *entitled* to AEDPA deference if the opinions are too short. But the Court has never held that a state-court merits opinion is not entitled to AEDPA deference because of its brevity, and such a holding would run contrary to the precedent among the circuit courts. See, e.g., *Harris v. Stovall*, 212 F.3d 930, 943 (6th Cir. 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177–78 (10th Cir. 1999); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). If the Court sees a need to clarify the level of deference due to summary state-court decisions, this issue provides all the more reason for the Court to grant certiorari review.

2. The Sixth Circuit's opinion fundamentally alters the meaning of *Mills v. Maryland*.

a. *Mills* does not require any affirmative clarifying instruction, but merely prohibits misleading instructions.

Spisak's bald assertion that the decision below is merely a "straight-forward application" of *Mills*, see Cert. Opp. at 3, is not responsive to the State's detailed argument that the jury instructions here are factually distinguishable from those in *Mills* in significant ways, see Cert. Pet. at 15–16. His argument that the jury sentencing instruction was "identical in its impact to the instruction given in *Mills*." Opp. Cert. at 3, assumes without explanation that the Spisak jury would likely misunderstand the instructions they were given to require unanimity on individual mitigating factors, even though there was nothing in the Spisak jury instructions that told them to make unanimous findings as to individual factors. *Mills* instructs courts to consider how a reasonable

juror could naturally understand the instructions. 486 U.S. at 375–76. Spisak incorrectly implies that a presumption of unconstitutionality attaches to jury instructions that are silent on whether individual factors must be unanimous. In reality, instructions need only be clarified if they were misleading in the first place, and Spisak's were not.

b. *Mills* does not prohibit "acquittal-first" jury instructions that require unanimous rejection of the death penalty before jurors may consider non-capital sentences.

Spisak's assertion that the Sixth Circuit simply applied the *Mills* rule also ignores the emphasis the Sixth Circuit placed upon its finding that the jury instructions were "acquittal-first" instructions. As explained in the State's petition, so-called "acquittal-first" jury instructions, or instructions requiring a jury to reject the death penalty before considering a non-capital sentence, bear no relation to the instructions found problematic in *Mills*. Cert. Pet. at 17–19.

Spisak ignores this half of the Sixth Circuit's reasoning, except to acknowledge that the prohibition against acquittal-first instructions finds its origin in a state law case, *State v. Brooks*, 75 Ohio St. 3d 148, 159–62 (1996). A state court misapplication of state law, however, even if it had occurred, is not a basis for habeas relief. See Cert. Pet. at 18 (citing authority). The Sixth Circuit has never adequately explained why acquittal-first instructions violate the federal Constitution, let alone why such instructions should fail under AEDPA review. Rather, the Sixth Circuit has only summarily declared that "acquittal first jury instructions . . . 'preclude[] the individual juror from giving effect to mitigating evidence'" without any explanation of how or why jurors are thus "precluded." See, e.g., *Davis v. Mitchell*, 318 F.3d 682, 689 (6th Cir. 2003). Whatever the source of the Sixth Circuit's concerns regarding "acquittal-first" jury instructions, they clearly are not the same concerns

articulated in *Mills* or any other Court precedent, and are not the proper subject matter for AEDPA habeas review.

3. The inter-circuit and intra-circuit conflict over *Mills*'s application is real, and warrants this Court's attention and resolution.

a. Cases from other circuits cannot be reconciled with the Sixth Circuit's decision in *Davis* and *Spisak*.

Spisak completely misses the point when he claims that no inter-circuit conflict exists because all of the State's cited cases cite *Mills*. The conflict, of course, is created by the circuit courts' differing applications of *Mills*. Specifically, unlike the Sixth Circuit, other circuits have concluded that reasonable jurors can be presumed to understand, and need not be affirmatively told, that unanimous agreement about the ultimate balance of factors is not the same thing as unanimous agreement about the existence of any particular factor. See, e.g., *LaFevers v. Gibson*, 182 F.3d 705, 719 (10th Cir. 1999); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 307-308 (3d Cir. 1991). Simply put, the jury instructions found unconstitutional in *Davis* and this case would have been upheld in the Third, Fourth, Eighth and Tenth Circuits.

Spisak does not address the State's further assertion that the Sixth Circuit stands alone in its prohibition of "acquittal-first" sentencing instructions. This Sixth Circuit rule conflicts with *Jones v. United States*, 527 U.S. 373 (1999), holding that jurors need not be told about their ability to deadlock on certain issues, and with other circuits' faithful application of *Jones*. See Cert. Pet. at 22 (collecting cases).

b. Sixth Circuit decisions are themselves inconsistent.

The laborious effort in the dicta of *Williams v. Anderson*, 460 F.3d 789, 810–13 (6th Cir. 2006), to reconcile the Sixth Circuit's precedent highlights the chaos of existing circuit law. Spisak insists that the lengthy *Anderson* dicta proves that no intra-circuit conflict exists. But the case's

strained analysis supports the need for this Court's clarification, which is why the State cited *Anderson* in its own petition. See Cert. Pet. at 23.

As an initial matter, *Anderson* only addresses the rule against acquittal-first instructions, and does not attempt to reconcile the circuit's holdings regarding unanimity instructions. For example, the unanimity instructions upheld in *Coe v. Bell*, 161 F.3d 320, 337 (1998) are indistinguishable from the unanimity instructions struck down here and in *Davis*. And even *Anderson*'s reconciliation of existing "acquittal-first" case law does not hold up. *Anderson* ignores *Coe*'s conclusion, cited approvingly by the decision below, that a trial court "may require juror unanimity as to the results of the process of weighing aggravating circumstances and mitigating factors." App. 43a. This cannot be squared with *Anderson*'s assertion that a jury must be free to reach a unanimous life sentence without first unanimously agreeing on the factor balance outcome. See 460 F.3d at 813. The scope of the acquittal-first rule and the basis of its rationale remain far from settled even within the Sixth Circuit.

B. The Court should review and reverse the Sixth Circuit's grant of habeas relief on Spisak's ineffective assistance claim.

1. The Sixth Circuit's failure to apply AEDPA is not absolved by its recitation of the AEDPA standard or by the state court opinion's brevity.

Spisak claims that the Sixth Circuit applied AEDPA review to his claim of ineffective assistance during the mitigation phase, but as discussed in A.1 above, the Sixth Circuit's mere recitation of the AEDPA standard is inadequate, and its opinion is devoid of any analysis of how the state court's decision unreasonably applied or contradicted this Court's precedent.

The Sixth Circuit's review standard for Spisak's ineffective assistance claims is particularly muddled, given that the relevant portion of the panel opinion at one point states that "trial counsel's performance here is subject to de novo review." See App. 33a. This statement seems to conflict with the panel's earlier explication of the AEDPA standard in its "Standard of Review" section that precedes the "Discussion" section's treatment of each individual claim. The panel offers no explanation for why de novo review should apply to the ineffectiveness claims in particular. The Sixth Circuit's separate references to both a blanket AEDPA review and claim-specific de novo review cast doubt on what standard the panel even thought it was applying.

Spisak again suggests that de novo review is appropriate because of the cursory nature of the Ohio Supreme Court's opinion.[1] But as explained in B.1 above, the circuit courts agree that unreasoned state court opinions are still subject to deferential AEDPA review upon the federal court's thorough review of the record.

2. The Sixth Circuit failed to take into account the special deference appropriate for reviewing counsel's closing arguments.

The Sixth Circuit failed to give proper AEDPA deference, or even proper de novo review under the deferential standard of *Strickland v. Washington*, 466 U.S. 668 (1984), to the state court's determination that defense counsel's assistance during closing arguments at sentencing.

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[1] Spisak falsely asserts that the State "fails to note" the abbreviated nature of the Ohio Supreme Court's merits decision. See Opp. Cert. at 7. The State openly acknowledged that the state court did not explain its decision, and cited several cases to support its assertion that the decision was still entitled to AEDPA deference. See Cert. Pet. at 29. The Court may examine for itself the Ohio Supreme Court's opinion, as the State faithfully reproduced it in its Appendix at 242a.

Spisak does not respond directly to the State's argument that counsel enjoys a special degree of latitude in shaping his closing arguments. Rather, Spisak makes generalized complaints about which facts the State did or did not choose to emphasize in its petition. As to Spisak's various allegations that the State misrepresents the tenor or context of the defense counsel's closing statements,[2] the record speaks for itself, see App. 268a–294a, and shows that defense counsel exhibited an ongoing effort to relate to the jury, to confront candidly the atrocity of Spisak's crimes, and to offer Spisak's psychiatric illness as a possible mitigating factor. Spisak points to his counsel's concession that the jury might reject the defense's theory of mitigation, but as the State noted in its petition, counsel is not unconstitutionally ineffective for acknowledging that the jury is free to reach whatever conclusion it sees fit. Cert. Pet. at 28. And for rhetorical effect, counsel framed the mitigating factor of mental illness as a reason that lies "not within Frank Spisak, but within ourselves" as a "humane people" that does not "terrorize one who can't intend to commit an offense." Pet. App. 276a–277a. Contrary to Spisak's assertions, see Cert. Opp. at 16–17, this rhetorical effort cannot be characterized as a concession that Spisak was undeserving of mitigation.

Nor did defense counsel's references to Spisak's gender identity render his assistance ineffective. Spisak takes particular issue with counsel's use of the word "fag" during the mitigation phase. But trial counsel obviously used that term in furtherance of his strategy –not to disparage his client. See Cert. Opp. at 19. The complete sentence at issue is

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[2] Insofar as Spisak promises a more "specific[]" discussion of the State's allegedly "misleading" statement of the case in his "reply" brief, see Opp. Cert. at 1, the State reminds Spisak that his cross-petition reply brief must be limited to addressing arguments raised in the State's response to his cross-petition; it is not a second chance for responding to arguments in the State's petition.

as follows: "And if getting along well in your neighborhood is keeping your across-the-hall neighbor in somewhat of a constant tizzy, not knowing if you are a fag or a transvestite or if you are going to start shooting up the place, . . . well, I suppose that we can lay that to rest then." App. 289a. In stating this, defense counsel was referencing his cross-examination of Spisak's neighbor, Sharon McConaha, as part of his strategy to elicit lay witness concessions that Spisak was insane, in order to compensate for the fact he could not find any expert witnesses who could testify that Spisak was legally insane. In questioning McConaha, defense counsel focused on several aspects of Spisak's behavior that a lay witness might find unusual, including the tendency to fire off guns indoors, to listen to recordings of Hitler, to wear Nazi uniforms and insignia, and to wear women's make-up and accessories. Tr. 655–680. During the course of this cross-examination, McConaha testified that she had in the past referred to Spisak as a "nut" or "crazy." Tr. 663, 671–672. As Spisak acknowledges, the theory that Spisak's gender identity was relevant to his legal sanity was also presented in at least one pre-trial expert psychiatric report. Cert. Opp. at 19–20.

One might, of course, disagree with the accuracy of defense counsel's insanity theory and with the rather insensitive manner in which the theory was presented. But the Sixth Amendment does not protect defendants from inartful, awkward, or ultimately unsuccessful closing arguments. Spisak cannot overcome the highly deferential standard the Court has set forth for determining whether a closing argument is so deficient as to render counsel's performance ineffective under the Sixth Amendment. See *Yarborough v. Gentry*, 540 U.S. 1, 5–6 (2004).

Finally, Spisak offers no response to the State's argument that the Sixth Circuit effectively ignored *Strickland*'s prejudice prong. See Cert. Pet. at 28–29 (quoting circuit court's single conclusory sentence that Spisak was

prejudiced). Even if this Court's precedent could support a conclusion that Spisak's counsel was deficient, the Sixth Circuit's grant of habeas must be reversed because Spisak cannot show prejudice. The Sixth Circuit's conclusion that defense counsel's closing argument was deficient cannot stand, under the proper AEDPA review or even under de novo review.

3. Spisak's efforts to introduce additional theories of ineffectiveness in his response brief must fail.

The sole ineffective assistance issue before the Court is whether the Sixth Circuit erred in determining, upon habeas review, that defense counsel's closing statement in mitigation contained hostile references that rendered the representation unconstitutionally ineffective. Spisak improperly seeks in his response brief to expand the question presented to encompass other theories of alleged inefficiency, arguing that defense counsel ignored other potential mitigating factors. See S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). Specifically, Spisak now asserts that his counsel should have argued his lack of criminal record as a mitigating factor. The federal district court concluded that Spisak procedurally defaulted this claim by failing to raise it in state court, see Dist. Ct. Op., Pet. App. at 159a–160a, and Spisak did not re-raise it before the Sixth Circuit. Spisak's second argument of a neglected theory of mitigation—namely, that Spisak could be rehabilitated in prison—was also not raised in Spisak's state court direct appeal and is likewise procedurally defaulted. Spisak has also failed to present either of these distinct theories of ineffective assistance in his conditional cross-petition. Spisak's efforts to introduce new legal arguments at this stage must fail.

CONCLUSION

For the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

Respectfully Submitted,

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